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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1963

No. [redacted] 27

AMERICAN FEDERATION OF MUSICIANS, ETC., ET AL., PETITIONERS,

vs.

EDDIE WITTSTEIN, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR CERTIORARI FILED JANUARY 20, 1964
CERTIORARI GRANTED MARCH 9, 1964

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United States Court of Appeals

FOR THE SECOND CIRCUIT

63 Civil 2548

EDDIE WITTSTEIN, BEN CUTLER, JULIUS SCHWARTZ, MARTY LEVITT, CLAUDE GARREAU, BERT FISHER, GEORGE AULD, LEO GRECO, HECTOR DE RIENZO, MILTON FAROWITZ and MATT GILLESPIE,

Plaintiffs-Appellees,

against

AMERICAN FEDERATION OF MUSICIANS OF THE UNITED STATES AND CANADA,

Defendant-Appellant.

63 Civil 2442

JULIUS SCHWARTZ, BUDDY KANE, ROBERT CURTIS, JOHN C. ROSENMERKEL, WILLIAM ARNOLD, FRANCES BARON, LEONARD O. GASKIN, LOUIS V. SCHWARTZ, HERBERT WASSERMAN, JUDITH BREGMAN, SOLOMON KOSARIN and GLEN WILLIAMS,

Plaintiffs-Appellees,

against

ASSOCIATED MUSICIANS OF GREATER NEW YORK, LOCAL 802, AMERICAN FEDERATION OF MUSICIANS OF THE UNITED STATES AND CANADA,

Defendant-Appellant.

Statement Under Rule 15(b)

The two actions involved in this appeal, 63 Civil 2442 and 63 Civil 2548, were instituted by service of summons

and complaint by appellees August 14 and 23, 1963, respectively.

On September 18, 1963, appellants moved for a consolidation of these two actions. The motion was granted and the actions consolidated for purposes of trial on October 16, 1963, by Judge Richard H. Levet.

On September 18, 1963, appellant American Federation of Musicians moved for summary judgment in 63 Civil 2548.

On September 23, 1963, appellant Associated Musicians of Greater New York, Local 802, moved for summary judgment in 63 Civil 2442.

On October 28, 1963, Judge Levet filed his Opinion, Findings of Fact and Conclusions of Law (No. 29,321) granting summary judgment to appellees in 63 Civil 2548 and on the second claim for relief in 63 Civil 2442.

On October 30, 1963, Judge Levet filed his Opinion, Findings of Fact and Conclusions of Law (No. 29,329) granting appellant Local 802's motion for summary judgment on the first cause of action in 63 Civil 2442.

Judgment was filed in 63 Civil 2548 on October 30, 1963. On the same date appellant American Federation of Musicians filed a notice of appeal.

Judgment was filed in 63 Civil 2442 on November 1, 1963. On the same date appellant Local 802 filed a notice of appeal from that portion of the judgment granting appellees summary judgment on the second claim for relief.

Complaint in 63 Civil 2442

(Schwartz R. 4-32)

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

JULIUS SCHWARTZ, BUDDY KANE, ROBERT CURTIS, JOHN C. ROSENMERKEL, WILLIAM ARNOLD, FRANCES BARON, LEONARD O. GASKIN, LOUIS V. SCHWARTZ, HERBERT WASSERMAN, JUDITH BREGMAN, SOLOMON KOSARIN and GLEN WILLIAMS,

Plaintiffs,

against

ASSOCIATED MUSICIANS OF GREATER NEW YORK, LOCAL 802, AMERICAN FEDERATION OF MUSICIANS OF THE UNITED STATES AND CANADA,

Defendant.

COMPLAINT
63 Civil Action 2442

Plaintiffs, complaining of defendant herein, by Godfrey P. Schmidt, their attorney, allege:

FOR A FIRST CLAIM.

1. This Court has jurisdiction over this cause of action under Title I of the Labor-Management Reporting and Disclosure Act of 1959 (hereinafter called "Act of 1959") and under Section 302 of the Labor Management Relations Act of 1947, as amended (hereinafter called "Act of 1947").

2. Plaintiffs are, and at all of the times hereinafter mentioned were, members in good standing of defendant labor union; and they bring this action as a class pursuant to Rule 23, F. R. C. P., for themselves and all sidemen who are members of defendant and who are so numerous as to make it impractical to bring them all before this Court.

3. At all of the times hereinafter mentioned, plaintiff, Julius Schwartz, was and still is a citizen of the State of New York, residing in Port Washington, New York.

4. At all of the times hereinafter mentioned, plaintiff Buddy Kane (alias Irving Katz) was and still is a citizen of the State of New York residing in Plainview, Long Island, New York.

5. At all of the times hereinafter mentioned, plaintiff, Robert Curtis, (*alias* Kitsis) was and still is a citizen of the State of New York, residing in Glen Cove, Long Island, New York.

6. At all of the times hereinafter mentioned, plaintiff, John C. Rosenmerkel (*alias* Jack Rosenmerkel), was, and still is a citizen of the State of New York, residing in Sunnyside, Long Island, New York.

7. At all of the times hereinafter mentioned, plaintiff, William Arnold, was and still is a citizen of the State of New York, residing in New York City, New York.

8. At all of the times hereinafter mentioned, plaintiff, Frances Baron, was and still is a citizen of the State of New Jersey, residing in Newark, New Jersey.

9. At all of the times hereinafter mentioned, plaintiff, Leonard O. Gaskin, was and still is a citizen of the State of New York, residing in New York City, New York.

10. At all of the times hereinafter mentioned, plaintiff, Louis V. Schwartz, was and still is a citizen of the State of New York, residing in New York City, New York.

11. At all of the times hereinafter mentioned, plaintiff, Herbert Wasserman, was and still is a citizen of the State of New York residing in New York City, New York.

12. At all of the times hereinafter mentioned, plaintiff, Judith Bregman (*alias* Jay Palmer), was and still is a citizen of the State of New York, residing in New York City, New York.

13. At all of the times hereinafter mentioned, plaintiff, Solomon Kosarin (*alias* Sol Kosarin), was and still is a citizen of the State of New York, residing in New York City, New York.

14. At all of the times hereinafter mentioned, plaintiff, Glen Williams, was and still is a citizen of the State of New York, residing in Syosset, Long Island, New York.

15. At all of the times hereinafter mentioned, plaintiffs were and still are regularly employed as sidemen by various orchestra leaders operating in either the single engagement field or the steady engagement field or in both.

16. Defendant, Associated Musicians of Greater New York, Local 802 (hereinafter sometimes called "Local 802"), is a labor organization within the meaning of the Act of 1959 and of the Act of 1947; and it is affiliated with American Federation of Musicians of the United States and Canada (hereinafter called "Federation"). Its principal office is located at 261 West 52nd Street, New York City, New York.

17. For some years prior to institution in this Court of Civil Action No. 62 Civil 2552, defendant enforced a certain By-law, or "Standing Resolution" having the force of By-laws, which is printed at pages 65-67 of the "Constitution and By-laws of Associated Musicians of Greater New York, Local 802, American Federation of Musicians revised as of September 26, 1960"; and reading as follows:

> Resolved, that effective as of October 1, 1943, until December 31, 1960:

(a) There shall be payable and collected from all members a 1 per cent tax on all engagement based on scale price therefor;

(b) Said 1 per cent tax shall likewise be levied on all salaries paid to officers of our local and to all members thereof regularly employed by the Union;

(c) All income realized from items (a) and (b) above mentioned shall be allocated to the General Fund of our local. Effective as of October 15, 1955, until December 31, 1960:

(a) There shall be payable by and collected from all members an additional 1 per cent on all engagements based on scale price therefor;

(b) Said additional 1 per cent tax shall likewise be levied on all salaries paid to officers and to all Local 802 members thereof regularly employed by the Union;

(c) All incomes realized from items (a) and (b) above-mentioned shall be allocated as follows:

1. ½ (one-fourth) (*sic*) of 1 per cent to be set aside for the purpose of continuing the campaign for live music.

2. ¼ (one-fourth) of 1 per cent to be set aside for a strike fund.

3. ½ (one-half) of 1 per cent to be allocated to the General Fund of our local to take care of the rising costs of administering the affairs of Local 802.

(Note: On all engagements there is payable a total of 2 per cent tax until December 31, 1960.)

Effective as of January 1, 1961: The 2% Tax payable on all engagements be reduced ½ of 1%.

Therefore, on all engagements there is payable a total of 1½% tax to the General Fund. The leader shall be held responsible for the collection and payment of this tax.

There be no further specific allocation of ¼ of 1% to the Live Music Fund and no further specific allocation of ¼ of 1% to the Strike fund.

(a) There shall be payable by and collected from all members a 1½ per cent tax on all engagements based on scale price, therefore: Leaders shall be held responsible for the collection and payment of this Tax.

(b) Said 1½ per cent tax shall likewise be levied on all salaries paid to officers of our local.

(c) All income realized from items (a) and (b) above-mentioned shall be allocated to the General Fund of our local.

18. The aforesaid "Standing Resolution" or By-law holds the *orchestra leader* (not the *sideman*) responsible for the collection and payment of the 1½% (formerly 2%) "local tax".

19. The decisions of this Court (Opinions No. 28179 anl 28294) and of the United States Court of Appeals (dated April 30, 1963) in 62 Civil 2552 construed Section 302 of the Act of 1947: (a) to forbid defendant from demanding or collecting from orchestra leaders who are employers the said "local tax"; and (b) to forbid such orchestra leaders from paying said "tax" (despite defendant's unilateral and long-standing policy and practice under which defendant and Federation regarded all orchestra-leaders as employees, regardless of the relevant facts and conduct).

20. Apparently because defendant eventually recognized the illegality (as defined by the Courts in the afore-

said decisions) of demanding and collecting the said "local tax" from orchestra-leader-employers, defendant's Executive Board, unilaterally and without any By-laws Meeting or other Meeting of the membership of Local 802 and in violation of the By-laws of Local 802, began, somewhere in 1962, to collect the said "local tax" directly from *sidemen,* as if said "taxes" were or constituted "membership dues".

21. To facilitate such collection of "local taxes" directly from sidemen or employee-musicians (*i.e.*, employees of the orchestra leaders who negotiate the engagements), defendant's Executive Board, within the last three months, issued to orchestra leaders and sidemen a printed form of wage deduction authorization, copy of which is hereto annexed marked "Exhibit A", to form part of this complaint.

22. Said form of authorization ("Exhibit A", hereto annexed) defendant required to be signed by sidemen; and it purports to authorize orchestra-leader-employers to deduct the "local tax" of 1½% from the wages which said leaders pay to their sidemen in all single and steady engagements; and to transmit this deduction to defendant as "*union dues.*"

23. The said "local tax" at no time in defendant's history prior to institution of 62 Civil 2552 constituted or was regarded as "*membership dues*" within the meaning of those words as used in Section 302 of the Act of 1947. Hereto annexed, marked Exhibit B, to form part of this complaint, is a relevant quotation from "*The Musicians' Voice*", which has a large circulation within defendant's membership.

24. In the single engagement field and in large areas of the steady engagement field, defendant, although it is in other respects a labor union, never bargains. and has

never bargained, collectively with any employer; and it never concludes, and has never concluded, labor contracts with orchestra leaders who are employers of sidemen in the single engagement field and in large areas of the steady engagement field.

25. Thus, the said form ("Exhibit A" hereto annexed) purports to be a check-off authorization in circumstances where (a) what is being checked off is not, under the law or in union practice and theory, *"membership dues"*; (b) there is no labor contract under which the check-off is authorized; and (c) defendant refuses to recognize orchestra leaders as employers or to deal with them as such.

26. Under the circumstances aforesaid, the said purported "dues" deduction authorization is violative of Section 302 of the Act of 1947 as amended.

27. Defendant's unilateral and dishonest conversion of the "local tax" into pretended "membership dues" was effectuated by defendant's Executive Board in violation of Title I, Section 101(a)(3) of the Act of 1959; in that it was not authorized either by a majority vote, by secret ballot, of the members in good standing voting at a general or special membership meeting, after reasonable notice of the intention to vote upon such question, nor by majority vote of the members in good standing voting in a membership referendum conducted by secret ballot.

28. Defendant's unilateral and dishonest conversion of said "local taxes" into purported *"membership dues"* by use of the aforesaid form ("Exhibit A" hereto annexed) violates Section 101(a)(1) of the Act of 1959; because it denies equal rights and privileges to members of defendant organization to attend membership meetings and to participate in deliberations and voting upon the proper business of such meetings.

29. Defendant's unilateral and dishonest conversion of said "local tax" into alleged "membership dues" as aforesaid, violates Section 101(a)(2) of the Act of 1959; in that it denies to plaintiffs, and all other defendant-union members, the right to meet and assemble freely with other members to express views, arguments or opinions about such alleged "membership dues" and to express at meetings of defendant organization views upon business which should properly come before such meeting.

30. Defendant, upon information and belief, began using the said form ("Exhibit A" hereto annexed) approximately three to six months prior to institution of this case of action.

31. Use by defendant of the aforesaid form ("Exhibit A" hereto annexed) and the direct collection of the said "local tax" from *sidemen*, violate defendant's By-laws as quoted above: (Par. 17 *supra*); in that

(a) said By-laws prescribe specifically that only the *leader*, not the *sideman*, shall be held responsible for the collection and payment to defendant of the "local tax" (Under said By-laws the orchestra leader, who is the employer in the single engagement field and in most of the steady engagment field of the sidemen in his orchestra, is alone responsible for the collection and payment of the tax. Therefore, the sidemen under said By-law, are not responsible for direct payment of said "Local Tax" to the defendant); and

(b) said By-laws require that changes of "tax" collection methods, as well as imposition of new dues and conversion of "taxes" to "membership dues" shall be authorized only by the September By-laws or by Special meeting.

32. No By-laws, no Constitution and no literature ever printed or distributed by defendant prior to institution of

62 Civil 2552, referred to the said "local tax" as *"dues"* or "membership dues"; and as a matter of fact said "local taxes" were never so regarded by orchestra leaders or sidemen who are or were members of defendant organization; nor were they ever so regarded or referred to before said litigation by defendant's officer or members.

33. To convert the said "local taxes" into "membership dues" is to place a highly inequitable and discriminatory burden upon a relatively few union members for the benefit of the vast majority of other members; because it means that these alleged "membership dues" are collected only from the comparatively few active, professional musicians and not from the vast number of professionally inactive members of defendant, who scarcely ever render any musical performances as such members. The result would be that some of defendant's members would pay, as such pretended "membership dues" as much as several hundred dollars per year, while others would not pay a single dollar for such "membership dues".

34. Upon information and belief, defendant purports to comprise more than 28,000 members. Of this number, less than 5,000 sidemen are really active as professional musicians. Most of the remaining members, numbering about 23,000, comprise persons who are simply union cardholders and who, from year to year, make almost no contribution of "local taxes" to the Union treasury (and of this remaining 23,000, more than 2,000 do not even pay the annual dues).

35. Plaintiffs have no adequate intra-union remedy; nor are there available to plaintiffs any intra-union procedures for the purpose of vindicating their rights under Federal Acts or for correcting the aforesaid illegality, inequity and discrimination; since defendant's officers have obstructed consideration of this problem by membership meeting.

36. Because of defendant's previous efforts to collect the said "local tax" directly from sidemen, plaintiffs, by petition dated February 13, 1963, signed by 553 members in good standing, addressed the following request (seeking a special meeting pursuant to defendant's By-laws) to defendant's Executive Board:

> We, the undersigned members of Local 802 A. F. of M., petition the Executive Board of Local 802, to hold a *special meeting* at Palm Gardens on the afternoon of April 24, 1963, 3:30 P. M., or at some other convenient location should Palm Gardens not be available.
>
> The purposes of this meeting shall be the following:
>
> 1) To determine the acceptance and practicability of the *recent tax form*, which attempts to place the responsibility for the computation and payment of the 1½% Tax, upon the individual member; and to find, if possible, a lawful substitute for the Tax (emphasis added in this paragraph).
>
> 2) To devise and enact new methods if necessary, for the payment of membership funds into the Union treasury.
>
> We further petition the Executive Board to:
>
> Suspend immediately upon receipt of this petition, the hearing of any case before the Trial or Executive Board involving the non-payment of the 1½% Local Tax as of December 12, 1961. Those cases dealing with charges and disciplinary action affecting the "good standing" of those charged members, shall be held in abeyance pending the decisions of the members at this meeting.

37. The "recent tax form" referred to in the foregoing quotation is hereto annexed, marked "Exhibit C", to form

part of this complaint. It was the forerunner of the authorization form which is hereto annexed as "Exhibit A", and defendant first distributed it to orchestra leaders and sidemen during 1962. Apparently both forms are now in use.

38. In many cases, with the encouragement or permission of defendant, orchestra leaders deduct the "local tax" without execution of any authorization by the involved sidemen; in some cases orchestra leaders refuse to pay wages to their sidemen unless and until the sidemen involved first execute an authorization (Exhibit A); and in many cases the deductions made by such orchestra leaders are improperly computed, and the orchestra leader does not even pay to defendant the full amount thus improperly deducted from sidemen's wages.

39. In March, 1963, defendant by its Executive Board rejected the aforesaid petition signed by 553 members.

40. Hereto annexed, marked "Exhibit D", to form part of this complaint, is a photostatic copy of the first page of "*Allegro*", official organ of defendant, dated June, 1963 (Vol. XLI No. 6) wherein the latter, unilaterally and without membership meeting but solely by the *ex parte* decision of its officers and Executive Board, has most recently and most emphatically promulgated the aforesaid unlawful, inequitable and discriminatory conversion of said "local tax" into alleged union "membership dues". Said publication (a) falsely represents the rationale of the U. S. Court of Appeals decision and of this Court's decisions as precedents construing Federal Acts; (b) falsely charges plaintiffs and other union members associated with them with "deliberately trying to deceive the members of the Local; and (c) falsely asserts, in effect, that said "local tax" constitutes "membership dues". However, the publication does show the futility of trying to enlist the cooperation of defendant's officers in obtaining the relief sought by this complaint.

41. Plaintiffs have no adequate remedy at law.

FOR A SECOND SEPARATE AND DISTINCT CLAIM.

42. Plaintiffs repeat and reallege each and every allegation of the paragraphs of this complaint numbered 1 through 16 and paragraphs numbered 35 and 41.

43. The "membership dues" established by Article 3 of the By-laws of defendant Local 802 are now and for many years have been "$24.00 per annum, payable $6.00 quarterly in advance on January 1, April 1, July 1, and October 1, * * *; and failure to pay any quarter's dues during the first month of such quarter, * * * increase[s] the installment due by 25¢ as a fine. If such fine and arrears are not fully paid before the end of that quarter, the membership and all rights and privileges of the one so in arrears * * * [is] deemed automatically ended and terminated, without further notice, anything contained in these By-laws to the contrary notwithstanding * * *".

44. Federation is a labor union or labor organization within the meaning of the Act of 1947 and the Act of 1959. It is affiliated with the AFL-CIO; and its principal office and place of business is located at 425 Park Avenue, New York 22, New York. It is an international union comprising hundreds of local unions throughout the United States and Canada.

45. Purporting to act pursuant to its Constitution and By-laws, Federation convoked, and defendant participated in, Federation's Annual Convention at the Fontainebleu Hotel, Miami Beach, Florida, during the period from June 10 to June 13 (inclusive), 1963.

46. Upon information and belief, approximately 1200 delegates attended said Convention; and among them were three delegates from defendant.

47. Upon information and belief, after the aforesaid Convention had been in progress for about three days, Federation's officers distributed to the attending delegates, at about 8:15 P. M. on June 12, 1963, a proposed resolution in the form of a printed leaflet, entitled "Recommendation No. 11, Recommendation of the Joint Law and Finance Committees", copy of which is hereto annexed, marked "Exhibit E" to form part of this complaint.

48. Federation's officers, aided and abetted by defendant's President, railroaded this proposed resolution to ballot by the Locals represented at the Convention within a period of less than six hours after distribution of the text thereof to the said delegates.

49. Upon information and belief, the delegates at said Convention were initially asked by Federation's officers to vote upon the said Recommendation by a voice vote.

50. Upon information and belief, the said voice vote was apparently unfavorable to passage of the said Recommendation; but the Chair rules, nevertheless, that "the ayes and the nays appeared to be of equal response". As a result Federation's officers arranged for a different voting procedure, allegely "in accordance with the provisions of Article 5 of the Federation's Constitution", namely, a roll-call voting procedure under which each Local represented at the Convention was asked to cast as many votes as that particular Local had members.

51. The aforesaid roll-call voting procedure resulted in a vote which took place in an "unusual night session" approximately 2:00 A. M., Thursday, June 13, 1963.

52. Said special and unusual night session had not been announced prior to the Convention. It began at about 8:15 P. M. on June 12th and it ended at about 2:30 A. M. June 13, 1963.

53. Upon information and belief, at such night session, and pursuant to said roll-call voting procedure, 185,068 votes were cast for Recommendation No. 11 and 113,742 votes were cast against the Recommendation.

54. Defendant, at said unusual night session, cast 28,438 votes *against* the Recommendation; despite the fact that one of defendant's delegates, namely, its President, had delivered to the Convention a fervent plea *in favor* of the Recommendation.

55. No notice of any kind was previously given to the members, to the delegates or the locals represented by the delegates respecting Recommendation No. 11.

56. The aforesaid roll-call voting procedure, by which Recommendation No. 11 was railroaded through the said Convention, was in violation of Section 101, Title I of the Act of 1959; in that, at said Convention no "majority of the delegates" voted for said "Recommendation" or was counted: since it was only *Locals* which voted, on the basis of their respective memberships.

57. Recommendation No. 11 was and is a composite of thirteen different resolutions, which were arbitrarily combined and presented to the delegates at the Convention in the form of a "package", on a take-it-or-leave-it basis; and Federation's officers permitted no division or separate consideration of each of the thirteen involved items.

58. Passage of the said Recommendation No. 11, as aforesaid, was also a violation of Section 101(a)(1) of Title I of the Act of 1959; because such passage violated the equal rights of the delegates, who are all members of the Federation in that said members-delegates: (a) did not have equal rights and privileges within the organization to vote at said Convention; (b) did not have an equal or genuine right to participate in the deliberations and voting

upon the business before the Convention as Recommendation No. 11; and (c) the rules and regulations adopted by Federation for the purpose of conducting the Convention and the unusual night session were unreasonable and were effective to suppress rather than to express the free legislative wishes of the assembled delegates.

59. The equality of the member-delegates' rights was further prejudiced by the fact that voting was not by delegates, as the Act of 1959 requires, and indeed as the Constitution and By-Laws of the Federation require, but by *Locals*, each local casting as many votes as the number of its members.

60. Upon information and belief, the number of Locals voting against said Recommendation No. 11 exceeded the number of Locals voting for it.

61. In view of all of its circumstances, especially the lateness of the protracted and unusual night session and the lack of previous notification respecting the text of Recommendation No. 11, the said night session, in fact and in law, amounted to a "special convention" within the meaning of Section 101(a)(3) of the Act of 1959; and no thirty day notice of the said Recommendation No. 11 was given as required by that Section.

62. The said roll-call vote violated Section 101(a)(1) of Title I of the Act of 1959; because it permitted Federation's Locals to vote the same members two, three or four times; since many of defendant's members belong to two, three or four Locals of the Federation. Thus, the equal rights and privileges of many members were further infringed and violated.

63. Recommendation No. 11 purports to increase the "membership dues" of defendant union; and defendant pursuant to said Recommendation No. 11 is planning to

enforce this increase in "membership dues" on the effective date of said Recommendation, namely on and after January 1, 1964.

64. Recommendation No. 11 establishes a "per capita tax" upon a discrimatory and unfair basis; because wherever Federation members belong to more than one Local affiliated with Federation, those members pay per capita taxes for *each* Local to which they belong.

65. The delegates at said Convention had no opportunity to confer with members of their respective Locals prior to voting on the advisability of Recommendation No. 11; and their mature judgment, as delegates assembled at a convention, was deliberately limited and in many cases suppressed by the manner in which Federation conducted the Convention.

66. The important matters arbitrarily gathered together in Recommendation No. 11 were left, because of the manner in which Federation conducted the said Convention, to uninstructed delegates and to delegates who had absolutely no opportunity to seek guidance and instruction from the members they represented.

67. As appears from the text of Recommendation No. 11, the members of the Convention were misinformed and misled thereby into regarding certain "taxes" based on the earnings of members (the so-called 10% "traveling surcharge", the so-called 10% "radio and television tax" and the so-called "theatre defense fund tax") as union "membership dues"; when, in fact, such taxes are not in fact or in law "membership dues" and were never so regarded by defendant, its officers or members during any time prior to certain recent litigation in which it redounded to the opportunistic advantage of Federation and of defendant to dub such "taxes" as "dues".

68. Such alleged "dues" would be illegal and discriminatory, since some members of Federation would, on the basis of such "dues" requirements, pay more than $10,000.00 per year for "membership dues" and most members would pay nothing.

69. Under Federation's By-laws, which are binding upon defendant, delegates or Locals desiring to introduce any resolution or measure to a convention are required to forward such resolution in written form to Federation's Secretary not later than fifteen days before the first session of the convention. In this respect, the Federation's By-laws were violated by passage of Recommendation No. 11, which was submitted only six hours prior to the night session at which it was voted.

70. Federation's By-laws require that any resolution or measure shall be printed and distributed to the Convention delegates at the *first* session of the Convention; and in this respect passage of Recommendation No. 11 violated such By-laws, as appears from the facts hereinabove set forth.

71. Federation's By-laws provide that no alterations or amendments of Constitution or By-laws may be made unless they are first proposed in writing; and such alterations or amendments must receive a majority vote *of the delegates* present in order to become a union "law". The passage of Recommendation No. 11 violated Federation's By-laws in this respect, because the *delegates* did not vote.

72. Paragraph numbered 4 of the Recommendation No. 11 provides:

> "Each Local shall maintain local regular periodic dues at no less than the rates existing on June 1, 1963, plus $6.00 per annum * * *".

As a result of this and other language in Recommendation No. 11 enacted as aforesaid, defendant in its official organ, "*Allegro*", for June, 1963, page 3, announced under the heading "Important Changes":

> "The AFM Convention adopted some important changes in its fiscal and other policies. Following are the most important of these changes:
>
> AFM Per Capita Dues
>
> "Each member shall pay through Local 802—in addition to the regular periodic dues of $24.00 per year—the sum of $6.00 per capita dues to the American Federation of Musicians • • • A new law approved by the Convention requires that Locals erase from their rolls, members who are delinquent for more than six months, with power to act before that time in the discretion of Local Boards. • • •"

Thus, defendant, aided and abetted by Federation, will (unless restrained by this Court) as of January 1, 1964, put into effect what it dishonestly calls an increase in "membership dues".

73. Said increase became effective under procedures which violate the Act of 1959, particularly Section 101 (a) (3) thereof, which requires that increases of dues and initiation fees by any labor union may be enacted only "by majority vote of the delegates voting at a regular Convention or, at a special Convention of such labor organization held upon not less than 30 days' written notice to the principal office of each Local • • • entitled to such notice • • • by majority vote of the members in good standing of such labor organization, voting in a membership referendum conducted by secret ballot • • •".

74. If the aforesaid Convention is to be regarded as a "regular convention", there was no majority vote *of the*

delegates; and if the said Convention is to be regarded as a special convention" (because of the unannounced night session), there was neither a majority vote of the delegates nor the 30 days' written notice to the principal office of the various locals affiliated with Federation.

75. Numerous members of the Local 802 are at the same time members of one, two and three other AFM locals. The same can be said of many members of other locals of Federation. For this reason, the same member voted for and against Recommendation No. 11; in view of the fact that the roll-call *Locals* voted their *members.* A member could, under this arrangement, have been voted four different times: one for each of the four locals to which he belonged. Moreover, these votes were sometimes opposed. Therefore, the method by which Recommendation No. 11 was passed was, on its face, unfair and improper.

76. The "Official Proceedings" of the 66th Annual Convention of the American Federation of Musicians, Third Day, Evening Session, demonstrates that, in addition to the irregularities described above, the roll-call vote resulted in arbitrary splits of Local memberships in the ballots cast by Local 29, Local 58, Local 77, Local 353 and Local 809. The splits were arranged upon the basis of one-third voting for the Recommendation and two-thirds voting against it, or *vice-versa.*

77. Because of the absence from the Convention of delegates of certain Locals (namely, Local 39, Local 107, Local 128, Local 216, Local 222, Local 255, Local 270, Local 312, Local 364, Local 392, Local 416, Local 433, Local 473, Local 479, Local 488, Local 531, Local 573, Local 600, Local 609, Local 636, Local 660, Local 663, Local 682, Local 765 and Local 798), the members of these Locals were not even permitted to vote one way or the other. Since no pre-

vious notice of Recommendation No. 11 was given to the various locals by Federation, no opportunity was presented to these absent Locals to decide on substitute delegates for such an important Convention.

Wherefore plaintiffs respectfully request:

(a) A declaratory judgment declaring illegal, void and of no effect defendant's new and unlawful requirements and rules concerning the aforesaid purported authorization form ("Exhibit A" hereto annexed) and the aforesaid system of making collection directly from sidemen of the said "Local Tax" by use of that form;

(b) A declaratory judgment declaring illegal, void and of no effect defendant's new and unlawful requirements and rules concerning the form hereto annexed as "Exhibit B" and the aforesaid system of making collection of said "Local Tax" directly from sidemen by use of that form;

(c) A preliminary injunction forbidding defendant, its officers, agents and employees from taking any steps to visit reprisals by way of expulsion, fine, penalty or otherwise, upon any sidemen who refuse to execute either of the aforesaid forms, Exhibits A and B, annexed to this complaint; or who refuse to pay said local taxes directly to defendant unless and until defendant's By-laws are duly changed to require such direct payments;

(d) A permanent injunction forbidding defendant, his officers, agents and employees from putting into effect or attempting to enforce in any way without valid amendment of defendant's By-laws, any system of collecting the aforesaid "local taxes" directly from sidemen or leaders;

(e) A permanent injunction forbidding defendant from increasing its membership dues except in conformity with Title I of the Act of 1959;

(f) A permanent injunction enjoining defendant from putting into effect or attempting to enforce in any way the

unlawful resolution of the Federation's 66th Annual Convention which purported to increase "membership dues" of defendant (and other AFM Locals) without compliance with Title I of the Act of 1959;

(g) A preliminary injunction forbidding defendant, its officers, agents and employees from taking steps to coerce execution of deduction authorizations by plaintiffs and other sidemen by means of threats of union penalties or reprisals.

(h) A preliminary injunction forbidding defendant, its officers, agents and employees from attempting to enforce in any way the collection from plaintiffs and other sidemen any increase of "membership dues" as a result of the aforesaid resolution of the Federation's 66th Annual Convention.

(i) Such other and further relief as to this Court seems just and proper.

GODFREY P. SCHMIDT,
Attorney for Plaintiffs.

Dated: New York, N. Y.

VERIFICATION BY ATTORNEY

CITY, COUNTY AND STATE OF NEW YORK:

GODFREY P. SCHMIDT, Esq., being duly sworn, says:

1. I am the attorney for Julius Schwartz, Buddy Kane, Robert Curtis, John C. Rosenmerkel, William Arnold, Frances Baron, Leonard O. Gaskin, Louis V. Schwartz, Herbert Wasserman, Judith Bregman, Solomon Kosarin and Glen Williams, plaintiffs in the within action.

2. I have read the complaint in the within action and know the contents thereof and know the same to be true of my own knowledge, except as to the matters therein stated

to be alleged on information and belief, and that as to those matters I believe it to be true.

3. The reason why this verification is not made by plaintiffs Buddy Kane, Robert Curtis, John C. Rosenmerkel, William Arnold, Frances Baron, Leonard O. Gaskin, Louis V. Schwartz, Herbert Wasserman, Judith Bregman, Solomon Kosarin and Glen Williams, and is made by me is that the said plaintiffs have their residences within counties other than the county wherein my office is located, except plaintiff Herbert Wasserman whose residence, is within the County of New York but who is actually absent from New York County on the date this verification is made.

4. The sources of my information and the grounds for my belief as to all matters not therein stated upon my knowledge are as follows: statements made to me by the said plaintiffs and documents and correspondence in my possession.

GODFREY P. SCHMIDT

(Sworn to before Anthony J. Shovelski August 13, 1963.)

Defendant's Notice of Motion for Summary Judgment in 63 Civil 2442.

(Schwartz R. 109)

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK.

[SAME TITLE.]

Sir:

TAKE NOTICE that upon the complaint herein, verified August 13, 1963; the annexed affidavits of Max L. Arons, Guy Scola, and Robert Crothers, all sworn to September 23, 1963, and the exhibits annexed thereto, defendant will move this Court in Room 618 of the United States Court House, Foley Square, New York, on September 26, 1963 at 11:00 A. M., or as soon thereafter as counsel can be heard, for an order under Rule 56 of the Federal Rules of Civil Procedure, granting summary judgment in defendant's favor dismissing the action on the ground that there is no genuine issue as to any material fact and that defendant is entitled to a judgment as a matter of law.

Dated: New York, N. Y.
September 23, 1963

Yours, etc.,

ASHE & RIFKIN,

By DAVID I. ASHE,
Attorneys for Defendant,
305 Broadway,
New York 7, N. Y.
WO 2-3275

To:

GODFREY P. SCHMIDT, Esq.,
Attorney for Plaintiffs,
60 East 42 Street,
New York 17, N. Y.
MU 7-1950

Complaint in 63 Civil 2548

(Wittstein R. 1-23)

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

EDDIE WITTSTEIN, BEN CUTLER, JULIUS SCHWARTZ, MARTY LEVITT, CLAUDE GARREAU, BERT FISHER, GEORGE AULD, LEO GRECO, HECTOR DE RIENZO, MILTON FAROWITZ and MATT GILLESPIE, Plaintiffs, *against* AMERICAN FEDERATION OF MUSICIANS OF THE UNITED STATES AND CANADA, Defendant.	Civil Action No. 2548

Plaintiffs, complaining of defendant herein by Godfrey P. Schmidt, their attorney, respectfuly allege:

1. This Court has jurisdiction over this cause of action under Title I, especially Sections 101 and 103, of the Labor Management Reporting and Disclosure Act of 1959, hereinafter called the "Act".

2. Plaintiffs are and for years have been members in good standing of defendant union and of one or more of its Locals.

3. Plaintiff Eddie Wittstein is, and for many years has been, an orchestra leader who regularly employs in his orchestras employee musicians (sidemen) who are members in good standing of defendant and one of its Locals. He resides in and is a citizen of the State of Connecticut.

4. Plaintiff Ben Cutler is, and for many years has been, an orchestra leader who regularly employs in his orchestras employee musicians (sidemen) who are members in good

standing of defendant and one of its Locals. He resides in and is a citizen of the State of New York.

5. Plaintiff Julius Schwartz is, and for many years has been, a sideman who is regularly employed by orchestra leaders to play as a sideman in their orchestras, comprising members of defendant Union. He resides in and is a citizen of the State of New York.

6. Plaintiff Marty Levitt is, and for many years has been, an orchestra leader who regularly employs in his orchestras employee musicians (sidemen) who are members in good standing of defendant and one of its Locals. He resides in and is a citizen of the State of New York.

7. Plaintiff Claude Garreau (d/b/a Allen Merritt) is a self-employed musician or independent contractor of his own musical services, who usually performs solo but who sometimes acts as an orchestra leader who employs in his orchestra sidemen who are members of defendant Union. He resides in and is a citizen of the State of New York.

8. Plaintiff Bert Fisher is, and for many years has been a sideman who is regularly employed by orchestra leaders to play as a sideman in their orchestras, comprising members of defendant Union. He resides in and is a citizen of the State of New York.

9. Plaintiff George Auld is and for many years has been, an orchestra leader who regularly employs in his orchestras employee musicians (sidemen) who are members in good standing of defendant and one of its Locals. He resides in and is a citizen of the State of New York.

10. Plaintiff, Leo Greco, is and for many years has been, an orchestra leader who regularly employs in his orchestra employee musicians (sidemen) who are members in good standing of defendant and one of its Locals. He resides in and is a citizen of the State of Iowa.

11. Plaintiff, Hector De Rienzo, is and for many years has been, an orchestra leader who regularly employs in

his orchestra employee musicians (sidemen) who are members in good standing of defendant and one of its Locals. He resides in and is a citizen of the State of North Carolina.

12. Plaintiff, Milton Farowitz, is and for many years has been, a sideman who is regular employed by orchestra leaders to play as a sideman in their orchestras, comprising members of defendant Union. He resides in and is a citizen of the State of New York.

13. Plaintiff, Matt Gillespie, is and for many years has been, an orchestra leader who regularly employs in his orchestras employee musicians (sidemen) who are members in good standing of defendant and one of its Locals. He resides in and is a citizen of the Commonwealth of Pennsylvania.

14. All of plaintiffs have played in and accept engagements or employment, respectively, in both the "single engagement field" and the "steady engagement field".

15. Plaintiffs bring this action, for themselves and for all members of defendant union, as a class action under Rule 23 of the Federal Rules of Civil Procedures; this complaint raises issues of rights common to all such members; and plaintiffs fairly represent members of said class.

16. Defendant is a labor union or labor organization within the meaning of the Act. It is affiliated with the AFL-CIO; and its principal office and place of business is located at 425 Park Avenue, New York 22, New York. It is an International union comprising more than 600 local unions throughout the United States and Canada.

17. Purporting to act pursuant to its Constitution and By-laws, defendant, during the period from June 10th to June 13 (inclusive), 1963, conducted its sixty-sixth Annual Convention at the Fontainebleu Hotel in Miami Beach, Florida.

18. Upon information and belief, approximately 1219 delegates (chosen, presumably, pursuant to the Constitu-

tion and By-laws of defendant and of its respective Locals) attended the aforesaid Convention; and these delegates represented 622 Locals of the Federation.

19. Prior to said Convention there was distributed (pursuant to defendant's By-laws) to the said delegates, a printed booklet entitled "Report of President, Secretary, Treasurer and Auditors, Sixty-Sixth Annual Convention of The American Federation of Musicians June, 1963, Miami Beach, Florida."

20. The said printed booklet contained, among other things, the "President's Report" for the year 1962-1963 to the delegates of the said Sixty-Sixth Convention; and that Report contained the following excerpt:

> "All local officers and members have been repeatedly informed during the past two years of the law suits directed against the thirty-year-old method of collecting the Federation's traveling surcharge and some locals' taxes. On April 30, 1963, the United States Circuit Court of Appeals in New York ruled against the Federation. The Federation's attorneys are seeking reconsideration of this ruling and, if unsuccessful, they will make immediate application to the United States Supreme Court to review this decision. There will, of course, be a full discussion at the Convention of this litigation and the consequences of this unfavorable ruling, and the Convention may well be obliged to undertake drastic revision of the Federation's fiscal structure."

21. The reference to "law suits" and to "litigation" in the foregoing quotation was to Civil Actions in this Court: namely, 60 Civil 1169, 60 Civil 4025 and 62 Civil 2552. Relevant rulings of the United States Court of Appeals for the Second Circuit are hereto annexed, marked "Exhibit A" and "Exhibit B", respectively, to form part of this complaint; and said rulings were, upon

information and belief, known to the delegates at said Convention.

22. Upon information and belief, after the aforesaid Convention had been in progress for about three days, defendant's officers (at 8:15 P. M. June 12, 1963) distributed to the attending delegates, a proposed resolution in the form of a printed leaflet entitled, "Recommendation No. 11, Recommendation of the Joint Law and Finance Committees", copy of which is hereto annexed, marked "Exhibit C", to form part of this complaint.

23. Defendant's officers "railroaded" this proposed resolution to ballot by the Locals represented at the Convention within a period of less than six hours after distribution of the text thereof to the said delegates.

24. Upon information and belief, the *delegates* at said Convention were initially asked by defendant's officers to vote upon the said "Recommendation" by a voice vote.

25. Upon information and belief, the voice vote was unfavorable to passage of said "Recommendation"; but the Chair ruled, nevertheless, that "The ayes and nayes appear to be of equal response." As a result, defendant's officers, who were running the Convention, arranged for a different voting procedure (as hereinafter described) allegedly "in accordance with the provision of Article 5 of The Constitution" of defendant.

26. The delegates of said Convention were thereafter influenced as hereinafter specified by defendant's officers to vote upon and to pass the aforesaid "Recommendation" or proposed resolution (Exhibit C) by a roll-call voting procedure, under which each Local represented at the Convention was asked to cast as many votes as that Local had members.

27. The aforesaid roll-call voting procedure resulted in a vote which took place in an "unusual night session"

(Exhibit E, *infra*, p. 15) conducted in the early hours (approximately 2 A. M.) of the morning of Thursday, June 13, 1963. Said special session had not been announced prior to the Convention. It began at about 8:15 P. M. on June 12, 1963, and ended at about 2:30 A. M. June 13, 1963.

28. Upon information and belief, at said "night session", 158,068 votes were cast for "Recommendation No. 11" (Exhibit C) and 113,742 votes were cast against the "Recommendation". (Local 802, for example, cast 28,438 against the "Recommendation".)

29. Upon information and belief, the number of Locals voting against said "Recommendation No. 11" exceeded the number of Locals voting for it.

30. Defendant's official organ, "International Musician" (in its July, 1963, issue) published the Convention Resolution resulting from the aforesaid "adoption" of "Recommendation No. 11" at p. 7; and a copy thereof is hereto annexed, marked "Exhibit D", to form part of this Complaint.

31. No previous notice of any kind, except as herein above described, was given to the delegates, or to the Locals represented by those delegates, respecting "Recommendation No. 11", its contents or text.

32. The aforesaid roll-call voting procedure, by which "Recommendation No. 11" was railroaded through the aforesaid Convention, was in violation of Section 101, Title I, of the Act, as hereinafter specified.

33. Section 101(a)(3) of the Act requires that an increase of dues and initiation fees by a labor union be enacted only:

> "by majority vote *of the delegates* voting at a regular convention or, at a special convention of such labor organization *held upon not less than thirty days' written notice to the principal office of each*

local or constituent labor organization entitled to such notice or * * * by majority vote of the members in good standing of such labor organization voting in a membership referendum conducted by secret ballot of * * * by majority vote of the members of the executive board or similar governing body of such labor organizations pursuant to express authority contained in the constitution and by-laws of such labor organization." (emphasis added)

34. There was, at the Convention which purported to pass "Recommendation No. 11", no vote of a "majority *of the delegates* voting at a regular convention." The *delegates* attending the said Convention did not vote by majority vote. Only the *Locals* voted; and they voted upon the basis of the numbers of their *members* (not of their *delegates*), each Local casting as many votes as it had members.

35. In view of all of its circumstances (especially the character of the announced meeting as an "unusual night session" and the lack of previous notification respecting the test of "Recommendation No. 11") the said night session in fact and in law amounted to a "special convention" within the meaning of Section 101(a)(3) of the Act.

36. Defendant gave no notice of thirty days or more to the principal office of each local affiliated with the defendant respecting defendant's purpose to increase dues and initiation fees nor respecting said "night session" and its agenda.

37. Upon information and belief, the only notice which defendant sent in writing respecting the Convention to the principal office of its constituent locals was that contained in (a) the aforesaid "Report (paragraph 10, *Supra*) and (b) in the April Issue of "International Musician", which did not mention Recommendation No. 11 or its items; and neither of these mentioned a special convention or night session.

38. The basic purpose and reason for Congressional enactment of Section 101(a)(3)(B)(i) of the Act (which defendant violated, as aforesaid) was to give to the officials and members of the constituent Locals of an international union previous notice of the exact terms and conditions of any proposed resolution aimed at increasing dues, initiation fees, general assessments and special assessments. No such notice was given by defendant to its constituent locals.

39. The said roll-call vote violated Section 101(a)(i) of Title I of the Act, because it permitted defendant's Locals to vote the same members two or more times; since many of defendant's members belong to two or more Locals. Thus, the *equal* rights and privileges of many members were infringed and violated by granting *plural* votes to some members.

40. In the process of said roll-call vote, the Act was further violated because the same members' vote was in some cases voted *for* "Recommendation No. 11" by one Local (to which said member belonged) and *against* the "Recommendation" by another Local (to which he also belonged); thus effectively negating that member's vote.

41. As will be observed from the inspection of Exhibit C, hereto annexed, "Recommendation No. 11" was and is a composite or melange of thirteen different resolutions which were arbitrarily combined and presented to the delegates in the form of a "package" (See Exhibit E, *infra*, p. 15); and defendant's officers who controlled the Convention or special convention permitted no division or separate consideration of each of the thirteen items involved. Thus, the delegates were allowed no fair and proper opportunity for consideration of "Recommendation No. 11" because they were presented with a "take-it-or-leave-it" choice.

42. Section 101(a)(I) of Title I of the Act provides in part as follows:

> "Every member of a labor organization shall have *equal* rights and privileges *within such organization* * * * *to vote in elections* * * * *and to participate in the deliberations and voting upon the business of such meetings*, subject to reasonable rules and regulations in such organizations' constitution and by-laws". (emphasis added)

43. In addition, defendant's procedure at the Convention or special convention in passing "Recommendation No. 11", as aforesaid, violated the equal rights of the delegates (who are all members of defendant) as outlined in the quotation from the Act appearing in the previous paragraph of this complaint; because (a) the member-delegates did not have equal rights and privileges within the organization to vote; (b) they did not have an equal or genuine right to participate in the deliberations and voting upon the business before the Convention in the form of "Recommendation No. 11"; (c) the rules and regulations adopted by defendant for the purpose of conducting the Convention or special convention and the "unusual night session" with respect to "Recommendation No. 11" were unreasonable and were effective to suppress rather than to express the free legislative wishes of the assembled delegates.

44. The equality of the member-delegates' rights was further unlawfully prejudiced by the fact that the voting was not by *delegates*, as the Act requires, but by *Locals* (each *Local* casting as many votes as the number of its members). Thus, if a particular Local were represented by *three* delegates, one of whom opposed the "Recommendation", the wishes of at least one of the attending delegates for that Local were not considered or expressed by the balloting nor was such dissident delegate given an equal opportunity to express or to ballot his opposition.

45. As appears from Exhibit E (*infra*) hereto annexed, on said roll-call election, some Locals were permitted by

defendant to split their membership vote in an arbitrary, unfair and discriminatory fashion as follows:

> "Local so-an-so 730 members: We vote 1⅓ *No.* 1⅔ Yes."

46. The members of defendant's Locals represented by said delegates had no notice whatever of the proposal in question ("Recommendation No. 11"); and the delegates went to the Convention and the "night session" without instructions or opportunity for instructions from their members.

47. The delegates had no opportunity to confer with members of their respective locals, prior to the voting on the advisability of "Recommendation No. 11" and its thirteen integral and important parts; and their mature judgment, as delegates assembled at a Convention, was deliberately limited and in many cases suppressed by the manner in which defendant and its officers conducted the Convention or special convention especially its procedures concerning said "Recommendation".

48. Thus, important matters ("Recommendation No. 11" and its thirteen included items) were left, because of the manner in which defendant conducted the meeting and the vote in question, to uninstructed delegates and to a special "unusual night session" (first announced in the morning of June 12, 1963) at the tail-end of the session wherein a vote eventuated in the wee hours of the morning, while delegates were weary, hurried, propagandized by defendant's speakers, and while they were harrassed by unanticipated delay, by their desire to return to their respective jurisdictions, as they had planned before the Convention or special convention, and by their need or desire for the *per diem* checks for Convention expenses which they were to receive under the defendant's By-laws.

49. By so presenting "Recommendation No. 11" to the delegates as a single "package", defendant coerced the

delegates into voting for or against the thirteen disparate matters conglomerated in a single proposed resolution and thus coerced an unfair and invidious choice which, for that very reason, was not a free choice.

50. As appears from the text of "Recommendation No. 11" the delegates were misinformed and misled thereby into regarding the "taxes" based on the earnings of members (the so-called 10% "traveling surcharge", the so-called 10% "Radio and Television Tax" and the so-called "Theatre Defense Fund Tax") as union "*membership dues*", when, in fact, such taxes are not (and were never regarded by defendant, its officers and members as) union *membership dues* during any time prior to the litigation whose effects defendant and its officers sought to evade by said "Recommendation No. 11"; and in any event such falsely alleged "dues", would have been illegal and discriminatory, since some members would pay more than $10,000 per year for such "dues" and others would pay nothing.

51. The "debate" concerning "Recommendation No. 11" was guided by defendants officers in such a manner as to prevent a parliamentary division and to suppress all effective opposition to the "Recommendation" and to its conglomerate character.

52. Hereto annexed, marked "Exhibit E", to form part of this complaint, is a copy of the publicity disseminated by defendant concerning the said Convention and special convention as well as said "Recommendation No. 11" (in the form of a report appearing in the July, 1963 issue of "International Musician", pages 8-10, 15-16 and 44).

53. Under its Constitution, defendant's Locals, where they have 150 members or less, were entitled to one delegate at the aforesaid sixty-sixth Convention; and attending Locals were entitled to one delegate for each 100 members or major fraction thereof, not exceeding three delegates for any single Local.

54. Under defendant's constitution, each Local at a convention may, upon roll-call, cast as many votes as it has members on questions affecting a change in defendant's "laws"; but all "laws" so passed must be referred to an overall convention committee consisting of the Executive Board of defendant and the chairman of all convention committees. Such overall committee may sanction or veto such a change in union "laws"; and the action of such overall convention committee is final and binding upon all of the members of defendant.

55. Upon information and belief, "Recommendation No. 11", after it had been passed by the vote of the Locals as aforesaid, was not sanctioned nor vetoed by any such overall convention committee. But even if it were, it could not thereby be legitimated, in view of the aforesaid violation of the Act and the violations of defendant's By-laws hereinafter set forth.

56. Under defendant's By-laws, delegates or Locals desiring to introduce to a convention any resolution or measure (such as "Recommendation No. 11") are required to forward such resolution, in written, duplicate form, to defendant's Secretary not later than fifteen days before the first session of the convention.

57. The By-laws provision described in the previous paragraph of this complaint of defendant's By-laws was not observed, but was violated, by defendant's improper procedures used, as aforesaid, for enactment of "Recommendation No. 11".

58. Defendant's By-laws require that any such resolution or measure (like "Recommendation No. 11") shall be printed, and shall be distributed to convention delegates at the *first* session of the convention.

59. The By-laws provision described in the previous paragraph of this Complaint was not observed, but was violated, by defendant's aforesaid improper procedures for enactment of "Recommendation No. 11".

60. On the morning of Wednesday, June 12, 1963, defendant's officers announced to the delegates that because the joint session of the Law and Finance Committees had worked on their draft (Recommendation No. 11) until the early morning hours of June 12, 1963, and because of the alleged limitations of available printing facilities, the text of the proposed resolution ("Recommendation No. 11") could not be presented to the delegates until much later that day (it was distributed at about 8:15 P. M. on June 12).

61. Defendant's By-laws provide that no alterations or amendments of defendant's Constitution or By-laws may be made unless they are proposed in writing; and such alterations or amendments must receive a majority vote *of the delegates* present to become a law".

62. The By-laws described in the previous paragraph of this complaint were not observed, but were violated, by defendant's aforesaid improper procedures for enactment of "Recommendation No. 11".

63. Defendant's nine-member Executive Board, under it's Constitution, comprises its President, Vice-President, Secretary, Treasurer, and an "Executive Committee" of five members, elected at large.

64. Under defendant's By-laws, defendant's President is required to appoint, for each convention, the following committees:

(1) Credentials Committee

(2) Law Committee

(3) Finance Committee

(4) Measure and Benefits Committee

(5) Good and Welfare Committee

(6) Organization and Legislation Committee

(7) International Musician Committee

(8) President's Report Committee

(9) Secretary's Report Committee

(10) Location Committee

(11) Election Committee

and such other committees as the Convention may direct.

65. Defendant's By-laws as described above were designed, or have the unavoidable effect, to concentrate control over the making of union legislation in the hands of defendant's President or, at least, in the hands of the said President and of defendant's Executive Board, because it enables the President, or the Executive Board and the President, to use the President's power of appointment of convention committee chairmen (who constitute the overall convention committee mentioned, *supra*) to veto any legislation of the convention which displeases said President, or the said President and Executive Board.

66. Thus, the aforesaid provisions of defendant's Constitution and By-laws gave to defendant and its officers, the undemocratic power to defeat the will or wishes of the assembled delegates; and to control the Convention or special convention in the interest of railroading the enactment of "Recommendation No. 11", which was carefully kept under wraps until the last hours of the Convention.

67. Despite numerous authoritative Court decisions condemning as illegal the said "traveling surcharge" and "local taxes", the aforesaid Convention and special convention took no steps to repeal the "local taxes"; and unlawfully permitted the "traveling surcharge" to remain in effect, and to be enforced and collected from orchestra-leader-employers, until January 1, 1964; and defendant, acting as if the decisions of this Court and of the United States Court of Appeals did not exist or had no effect,

are still deliberately and systematically enforcing collection of said "traveling surcharge" from orchestra-leader-employers; and defendant thus puts its members and the reputation of their union under the stigma of contumacy toward Federal Courts and of civil and criminal violation of Federal Statute.

68. Plaintiffs have long opposed said "traveling tax" or "traveling surcharge" as both unfair and illegal and also as a discriminatory burden on some union members who were few in number by comparison with the number of those who never or rarely paid such "surcharge". But plaintiffs claim that the said unlawful exaction should be replaced lawfully, democratically and immediately; and not by a procedure which (a) violates the Act; (b) breaches defendant's own By-laws; (c) deliberately conceals the replacement program until vote on that program was only six hours away; and (d) undemocratically avoids all effective notification to defendant's membership; and (e) contumaciously disregards authoritative decisions of Federal Courts.

69. No reasonable hearing procedures within defendant's organization are available to secure for plaintiffs the relief herein sought; and the next (Sixty-seventh) Convention is scheduled two years hence; and defendants officers are manifestly committed irrevocably to the challenged Resolution which they furtively rushed through the aforesaid night session.

70. Plaintiffs have no adequate remedy at law.

WHEREFORE plaintiffs respectfully pray this Court for

(A) A declaratory judgment declaring (a) that the aforesaid Convention procedure concerning "Recommendation No. 11" was illegal and that the Resolution in question (Recommendation No. 11) is null and void under the Act and under defendant's Constitution and By-laws; and (b) that the said Resolution which purported to enact "Recom-

mendation No. 11" at said Convention or special convention is null and void; and

(B) Preliminary and permanent injunctions enjoining defendants from carrying into effect the aforesaid Resolution which purported to enact "Recommendation No. 11" (Exhibit C); and

(C) Such other and further relief as this Court deems just and lawful.

Dated: New York, N. Y.
August 23, 1963.

GODFREY P. SCHMIDT
Attorney for Plaintiffs
Office & P. O. Address
60 East 42nd Street
New York 17, N. Y.
Tel: MU 7-1950

Defendant's Notice of Motion for Summary Judgment in 63 Civil 2548

(Wittstein R. 216)

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

Sir:

TAKE NOTICE that upon the complaint herein, dated August 23, 1963; the annexed affidavits of Guy Scola, Max L. Arons, and Robert Crothers, all sworn to September 18, 1963, and the exhibits annexed thereto, defendant will move this Court in Room 2103 of the United States Court House, Foley Square, New York, on September 26, 1963 at 11:00 A.M., or as soon thereafter as counsel can be heard, for an order under Rule 56 of the Federal Rules of Civil Procedure, granting summary judgment in defendant's favor dismissing the action on the ground that there is no genuine issue as to any material fact and that defendant is entitled to a judgment as a matter of law.

Dated: New York, N. Y.
September 18, 1963.

Yours, etc.,

McGOLDRICK, DANNETT, HOROWITZ & GOLUB

By WILLIAM W. GOLUB
Attorneys for Defendant
3 East 54 Street
New York 22, N. Y.
MU 8-7440

To:

GODFREY P. SCHMIDT, Esq.
Attorney for Plaintiffs
60 East 42nd Street
New York 17, N. Y.
MU 7-1950

Defendant's Statement Under Rule 9(g) in 63 Civil 2548

(Wit'stein R. 217-219)

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE.]

There is no genuine issue to be tried with respect to the facts material to plaintiffs' claim as appears from the following comparison of the material allega ions of the Complaint and the uncontrovertible facts:

1. The allegation: The delegates at Federation's 1963 annual Convention received less than six hours notice of Recommendation No. 11 (which abolished the Traveling Surcharge and substituted per capita dues effective January 1, 1963) and Recommendation No. 11 was "railroaded" through the Convention (Compln't, pars. 22, 23, 43, 47, 48, 50, 51, 65, 66).

1A. The uncontrovertible facts: At the opening of the Convention on June 10, 1963, each delegate received Recommendation No. Two which had been prepared by the International Executive Board. Recommendation No. Two was submitted to a Joint Law and Finance Committee for study and their recommendation. After the Joint Committee had studied Recommendation No. Two on June 10, 11 and 12, it prepared modifications of Recommendation No. Two which it printed as Recommendation No. 11, which was distributed to the delegates on June 12, 1963. Recommendation No. 11 is identical with Recommendation No. Two in that each of them abolish the Traveling Surcharge and provide for an increase in per capita dues. The sole difference between them with regard to fiscal matters is that under Recommendation No. Two the increase would have been to $8 per annum whereas under Recommendation No. 11, the increase was only to $6 per annum, and certain exceptions in the latter Recommendation were made with respect to life and honorary members. Thus Recommendation No. 11

was nothing more than the embodiment of the Joint Committee's suggested modification of Recommendation No. Two, and the charge that the officers of Federation "railroaded" Recommendation No. 11 through the Convention is without substance in fact. Indeed, long in advance of the Convention, delegates were alerted by Federation's president to the fact that at the Convention they would be asked to consider drastic revisions of Federation's fiscal structure.

2. The allegation: The holding of a night session to consider Recommendation No. 11 was improper (Compl't, pars. 27, 35, 43, 46, 48):

2A. The uncontrovertible facts: The possibility of a night session was adverted to by Federation's president and by the chairman of the Law and Finance Committee on June 10, the opening day of the Convention. The holding of a night session was approved by a vote of the delegates on the morning of June 12, the date when the evening session was held.

3. The allegation: The provisions of Federation's Constitution and By-laws were not followed with respect to the time for distribution of Recommendation No. 11 (Compl't, pars. 56-59, 61, 62).

3A. The uncontrovertible facts: Recommendation No. 11 was not a recommendation of any delegate or local but was the recommendation of the International Executive Board as modified by the Joint Committee. Federation's Constitution and By-laws contains no provision with respect to the time for distribution of recommendations submitted by the International Executive Board or by committees of the Convention. The provisions of the By-laws regarding the time for distributing resolutoins relates solely to resolutions submitted by delegates and locals.

4. The allegation: The provisions of Federation's Constitution and By-laws were not followed with respect

to voting upon Recommendation No. 11. (Compl't, pars. 61-62)

4A. The uncontrovertible facts: The procedure followed in voting upon Recommendation No. 11 was strictly in accordance with Federation's Constitution. A roll-call vote (under which delegates vote in accordance with the membership of their locals) must be taken at the request of five locals or ten delegates. A delegate did request such a vote on behalf of five locals, and a roll-call vote was taken. A substantial majority of the delegates (who cast votes based upon membership in their locals) voted in favor of Recommendation No. 11.

5. The allegation: Officers of the Federation required the delegates to vote on Recommendation No. 11 as a package (Compl't, pars. 41, 49).

5A. The uncontrovertible facts: The delegates on the evening of June 12th voted down a proposal that the resolutions contained in Recommendation No. 11 be voted upon seriatum.

6. The allegation: The Convention Committee (consisting of the International Executive Board and the chairman of all Convention Committees) did not approve of Recommendation No. 11 as is required by Article 5 of Federation's Constitution (Compl't, par. 55).

6A. The uncontrovertible facts: The Convention Committee approved Recommendation No. 11 on June 13, 1963.

We do not admit the relevancy or materiality of any of the allegations of the Complaint controverted herein.

McGoldrick, Dannett, Horowitz & Golub

By Emanuel Dannett

Attorneys for Defendant

Office & P. O. Address

3 East 54 Street

New York 22, New York

MU 8-7440

Affidavit of Guy Scola, Sworn to September 18, 1963, Read in Support of Defendants' Motions for Summary Judgment

(Wittstein R. 220-234; 246a-246g)

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE.]

STATE OF NEW YORK }
COUNTY OF NEW YORK } ss.:

GUY SCOLA, being duly sworn, deposes and says:

1. I am the Assistant Secretary of defendant American Federation of Musicians of the United States and Canada (the "Federation").

2. This affidavit is submitted in support of defendant's motion for summary judgment.

3. Federation is a labor organization affiliated with the AFL-CIO. It is an international union comprising 675 local unions having jurisdiction throughout the United States and Canada. In June 1963, Federation had approximately 282,000 members who perform services primarily as instrumentalists, conductors, arrangers and copyists. Approximately 256,000 are members of only one local; approximately 26,000 are members of two or more locals.

4. A copy of the Constitution and By-Laws of the Federation which were in effect immediately prior to the commencement of Federation's June 1963 annual convention is annexed hereto and marked Exhibit A*.

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* The Constitution and By-Laws were amended at the annual convention held in June of this year. Certain of the amendments which are germane to the instant action will be hereinafter referred to.

Unless otherwise stated, all references in this affidavit to Federation's Constitution and By-Laws are to the Constitution and By-Laws which were in effect immediately prior to the holding of the June 1963 convention.

Affidavit of Guy Scola, Sworn to September 18, 1963, Read in Support of Defendants' Motions for Summary Judgment.

5. Federation's officers consist of its president, Herman D. Kenin; its vice-president, William J. Harris; its secretary, Stanley Ballard; its treasurer, George V. Glancy, and an executive committee, the members of which are Lee Repp, Alfred J. Manuti, Charles H. Kennedy, Hal C. Davis and Walter M. Murdoch (Const., Art. 8, §1). Federation's International Executive Board consists of its president, vice-president, secretary, treasurer and its executive committee (By-Laws, Art. 1).

6. Federation's Constitution contains the following provisions (Art. 5; Art. 6, §§1, 2) regarding the election of delegates, and their voting rights:

"ARTICLE 5—REPRESENTATION AND DELEGATES

All Locals of this Federation of one hundred and fifty members or less shall be entitled to one delegate. All Locals shall be entitled to one delegate for each one hundred members or a major fraction thereof, not exceeding three delegates for any one Local, but each Local shall be entitled to one vote for each one hundred or major fraction thereof, but no Local shall cast more than ten votes, and the number each Local is entitled to shall be computed from the last report made on January 1st before the convention by the Local, according to the books of the Treasurer. On questions affecting a change in the laws, each Local may, upon roll call, cast as many votes as it has members, as per book of the Treasurer, A. F. of M. All laws so passed shall be referred to a convention committee consisting of the Executive Board, A. F. of M., and chairmen of all committees, who may sanction or veto same, their action to be final. Roll call shall be demandable and had under this Article on demand of ten delegates or five Locals."

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"ARTICLE 6—DELEGATES—HOW ELECTED

SECTION 1. Delegates to the Convention and alternates for those delegates who may be unable to attend the sessions shall be elected by the Locals either at annual, regular or special meetings, or at regular or special elections, but in any event, by secret ballot. At least fifteen (15) days prior to the election of delegates, notice thereof shall be mailed by the Local to the last known home address of each member in good standing.

Elections held in violation of this law are null and void.

SECTION 2. No member shall be permitted to represent more than one Local, nor shall any member be permitted to act as delegate for a Local unless he is a full member in good standing in said Local."

7. Federation customarily holds an annual convention of its delegates in June of each year (Const., Art. 4).*

8. In June 1963 there were 1,176 delegates eligible to vote at the June 1963 annual convention (Exh. B, Official Proceedings of June 1963 annual convention, p. 30).

THE TRAVELING SURCHARGE AND LITIGATION PERTAINING THERETO

9. Article 15 of Federation's By-Laws makes provision for a Traveling Surcharge and its collection and transmission by orchestra leaders to Federation. The Traveling Surcharge has been Federation's main source of revenue for over thirty years. Thus, in 1962, the Surcharge repre-

* The June 1963 annual convention passed a resolution which provides that commencing "with June, 1964 (unless commitments for 1965 proved to be uncancellable) there shall be Biennial Conventions".

sented 64% of Federation's total income. Federation's treasurer made the following report concerning Federation's income for that year (Exh. C, Report of the President, Secretary, Treasurer and Auditors, prepared in connection with the June 1963 annual convention, p. 162):

		Per Cent
"Traveling Orchestra Surcharge	$1,428,538	63.88
Per Capita Tax	379,473	16.97
Federation Initiation Fee	319,179	14.27
All others	109,251	4.88
	$2,236,441	100.00"

10. On or about October 14, 1960, an action entitled Carroll, et al., *v.* Associated Musicians of Greater N. Y. Local 802, et al. (60 Civil 4025; the "Carroll action") was brought in this Court on behalf of orchestra leaders in the single engagement field who claimed that the collection and transmission by them of the Traveling Surcharge to Federation was violative of Section 302 of the Labor-Management Relations Act of 1947 (the "LMRA"). Similar actions have been commenced in other United States District Courts.

11. On or about July 20, 1962, an action entitled Ben Cutler, et al. *v.* American Federation of Musicians, et ano. (62 Civil 2552; the "Cutler action") was also commenced in this Court which similarly challenged the validity of the collection and transmission of the Traveling Surcharge by orchestra leaders such as plaintiff Ben Cutler.

12. I am informed by Counsel that: On or about April 30, 1963 the United States Court of Appeals for this circuit affirmed the judgment of this Court, which had held that the collection of the Traveling Surcharge by orchestra leaders such as Cutler and its transmission to Federation was violative of Section 302 of the LMRA.

Affidavit of Guy Scola, Sworn to September 18, 1963, Read in Support of Defendants' Motions for Summary Judgment.

13. I am informed by Counsel that: On September 16, 1963 a petition for certiorari was filed with the United States Supreme Court by the defendants seeking a review of the judgment of the United States Court of Appeals in the Cutler Action.

DISCUSSION OF CHANGES IN FISCAL POLICY PRIOR TO JUNE 1963 ANNUAL CONVENTION.

14. Subsequent to the commencement of the Carroll action and for a period of approximately two years prior to the June 1963 annual convention, discussions took place at local meetings, at regional conferences of locals, at meetings of the International Executive Board, and at Federation's annual 1962 convention, concerning the possible consequence of a decision holding that the method of collection of the Traveling Surcharge was illegal, and the measure, if any, which would have to be taken to enable the Federation to replace the Traveling Surcharge.

15. On or about December 5, 1962, there was mailed to each member of Federation a 12-page printed message (Exh. D) from President Kenin, dealing with the Traveling Surcharge. He stated, among other things, as follows:

> "There will, I assure you, be no opposition from any Federation official to any change desired by the membership. Nor is there anything I know of that can prevent the Convention from abandoning the surcharge and adopting some new method of maintaining the Federation—if this is its will. Obviously, the only way that a union can evaluate and judge wisely on the critical problem of how much and from whom its revenues should be raised is by full discussion, debate, deliberation, and vote."

16. The June 1963 annual convention was scheduled to commence on Monday, June 10, 1963. In preparation for

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the convention, a letter (Exh. E) from President Kenin, dated May 7, 1963, was mailed to all local officers. The letter stated:

> "To All Local Officers:
>
> "I have previously advised you of the history and status of the court cases involving the method of collection of the Federation's traveling surcharge and of some locals' taxes. The United States Circuit Court of Appeals, on April 30, 1963, ruled against the Federation in the case known as *Cutler* v. *A. F. M.*
>
> "The Federation's attorneys are seeking reconsideration of this holding by the Circuit Court. If they are unsuccessful, an immediate application will be made to the United States Supreme Court to review the decision.
>
> "There will of course be a full discussion of this litigation at the forthcoming Convention which may well be obliged to undertake drastic revision of the Federation's fiscal structure.
>
> "Meanwhile, I refer you to my message of December 5, 1962, a copy of which is enclosed. Until further word from the Federation, the procedures outlined in the answers to questions 6, 7, 8, 9 and 10 in that letter still apply and should be followed."

17. In further preparation for the Convention, on or about May 24, and 27, 1963, copies of reports (Exh. C) prepared by the president, secretary, treasurer and auditors of Federation were mailed to all delegates to the Convention. The President's report stated, in part, as follows (Exh. C, p. 6):

> "All local officers and members have been repeatedly informed during the past two years of the law suits directed against the thirty-year-old method

of collecting the Federation's traveling surcharge and some local's taxes. On April 30, 1963, the United States Circuit Court of Appeals in New York ruled against the Federation. The Federation's attorneys are seeking reconsideration of this ruling and, if unsuccessful, they will make immediate application to the United States Supreme Court to review this decision. There will, of course, be a full discussion at the Convention of this litigation and the consequences of this unfavorable ruling, and the Convention may well be obliged to undertake drastic revision of the Federation's fiscal structure."

18. During the two weeks preceding the opening of the Convention the International Executive Board met in Miami Beach. On May 30, June 1, 3, 4, 6, 7 and 10, there were extended discussions as to the recommendations to be placed before the delegates with respect to the problems created by the Cutler decisions (see minutes of those meetings set forth in the Official Proceedings, Exh. B, pp. 361-72). The International Executive Board concluded to recommend to the delegates that the traveling surcharges as well as certain other taxes be abolished, and that in their place the prior per capita charge, which aggregated $2.10* per annum, be increased to $8.00 per annum.

19. Those recommendations, together with certain other recommendations of the International Executive Board, were put in the form of a proposed resolution and printed under the heading of "Recommendation No. Two" (Exh. F). Copies of Recommendation No. Two were distributed to all delegates at the opening of the convention on June

* The $2.10 per annum consisted of per capita dues of $1.40; a 60¢ charge for the International Musician, and a 10¢ contribution to the Lester Petrillo Memorial Fund (a fund created to assist indigent musicians).

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10, 1963. Recommendation No. Two contained the following proposed resolutions, to become effective January 1, 1964:

"1. The Federation shall not impose dues based upon earnings of members ('taxes'). Such amendment shall apply to the 10% Traveling Surcharge Tax, the 15% Radio and Television Tax and the Theatre Defense Fund Taxes.

"2. (a) Annual Federation Per Capita Dues payable by Locals to the Federation shall be $8.00 (inclusive of the Per Capita contribution for the Official Journal and the Lester Petrillo Fund).

(b) Federation Per Capita Dues shall not be payable by any Local on travelling or transfer members.

"3. Federation Initiation Fees shall be as follows:

$ 4.00—if Local Initiation Fees are $10.00 or less.

$ 9.00—if Local Initiation Fees are more than $10.00 but not more than $20.00.

$14.00—if Local Initiation Fees are more than $20.00 but not more than $40.00.

$22.00—if Local Initiation Fees are more than $40.00 but not more than $50.00.

$30.00—if Local Initiation Fees are more than $50.00 but not more than $100.00.

$40.00—if Local Initiation Fees are more than $100.00.

"Federation Initiation Fees shall not be imposed upon the induction into any Local of any transfer or traveling member. The present ceiling on Local Initiation Fees shall be increased from $100.00 to $150.00.

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"4. Each Local shall maintain Local regular periodic dues at no less than the rates existing on June 1, 1963, plus $8.00 per annum. Such rates may be reduced with the consent of the International Executive Board.

"5. No Local shall require any member of the Federation who is not a member of such Local to make any payment based on regular periodic dues of such Local unless such member has performed within the jurisdiction of such Local for at least four (4) consecutive weeks. No such payment shall exceed the rate of regular periodic dues of such Local less the amount included therein for Federation Per Capita Dues ($2.00 per three (3) months).

"6. No Local shall require any member of the Federation who is not a member of such Local to pay any dues based upon earnings ('taxes') unless such dues are uniformly imposed by such Local upon its own members; but no such dues shall be payable by traveling members performing recording, symphony, concert and opera services.

"7. Any traveling member failing to pay the lawfully imposed dues of a Local of which he is not a member shall be subject to automatic expulsion from the Federation.

"8. Present provisions establishing minimum wages for traveling engagements at 10% in excess of applicable Local scales shall be reaffirmed."

20. After the International Executive Board had concluded to submit Recommendation No. Two to the convention, conferences attended by Federation officers and delegates of various locals were held in the week prior to the

opening of the convention at which a change in fiscal policy was discussed. Thus, President Kenin addressed a conference of Canadian Locals on June 9 on the subject. The minutes of the conference state:

> "At this point, President Kenin comes in to extend his greetings to the Conference; he makes the delegates acquainted with the financial situation of the Federation. He explains that the traveling musician earning 12% of the revenues pays 63% of the operations. This, he says, is an immoral situation which must cease. He states the Federation will have to rely on the per capita tax to carry on. He mentions that some of our locals' dues are as low as $3.00 per year. We have the right, said he, to tax a man for his work. He cites the charwoman's union who pay $36.00 a year to their national association. We have had an easy road up to now, said he, some locals have built their own homes with other people's money. We shall have to find a new formula. He urges not to get panicky as he feels that locals will be willing to pay a higher per capita tax in order to get the Federation going."

PROCEEDINGS AT THE 1963 ANNUAL CONVENTION

21. At the opening of the convention on June 10, President Kenin delivered an address, a significant portion of which dealt with Recommendation No. Two, The Official Proceedings summarized President Kenin's address, in part, as follows (Exh. B, pp. 31-32):

> "Taking a serious note almost at the commencement of his remarks, President Kenin said the burning question concerned a revision of the A. F. of M.'s fiscal policy.
>
> . . . . . .

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"'We are asking this Convention to grant a change to a responsible per capita dues basis that will insure a continuation of the international union,' he said. The resolution proposing this change will be thoroughly considered and debated with opportunity for all to be heard.

"Lacking this reform, President Kenin warned, the A. F. of M. could be confronted by a dual union problem wherein musician critics of the old surcharge methods may seek to break away and attempt to form a rival union.

"Concluding on the note that a 'great debate' was desirable, President Kenin thanked the delegates for their attention."

22. On the opening day of the convention Recommendation No. Two was referred to a Joint Committee of the Law and Finance Committees. During the course of his opening address, previously referred to, President Kenin informed the delegates that those who wished to appear before the Joint Committee would have an opportunity to do so and that there might be a necessity for night sessions.

23. The Joint Committee, after studying Recommendation No. Two, and hearing the views of various delegates, concluded that Recommendation No. Two should be adopted by the convention, except that it should be modified by providing for per capita dues of $6 per annum, instead of $8 per annum, and by including certain exceptions with respect to life and honorary members.

24. The recommendations of the Joint Committee with respect to Recommendation No. Two, as well as certain other recommendations of that Committee, were printed as Recommendation No. 11 (Exh. G). Recommendation No. 11 contained the following proposed reso-

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lution, among others, concerning the change in fiscal policy to become effective January 1, 1964:

"1. The Federation shall not impose dues based upon earnings of members ('taxes'). Such amendment shall apply to the 10% Traveling Surcharge Tax, the 15% Radio and Television Tax and the Theatre Defense Fund Taxes.

"2. (a) Annual Federation Per Capita Dues payable by Locals to the Federation shall be $6.00 (inclusive of the Per Capita contribution for the Official Journal and the Lester Petrillo Fund).

"However, the present Per Capita of $2.10 shall continue with respect to all present Life and Honorary Members and with respect to all members who under presently existing rules of the Locals will become Life and Honorary Members within one (1) year after the effective date of this recommendation. Thereafter the full $6.00 Federation Per Capita Dues shall be paid by the Locals on such members.

"2. (b) Federation Per Capita Dues shall not be payable by any Local on traveling or transfer members.

"3. Federation Initiation Fees shall be as follows:

If the Local Initiation Fee is $10.00 or less, the Federation Initiation Fee shall be an additional $4.00.

If the Local Initiation Fee is more than $10.00 but not more than $20.00 the Federation Initiation Fee shall be an additional $9.00.

If the Local Initiation Fee is more than $20.00 but not more than $40.00, the Federation Initiation Fee shall be an additional

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$14.00. If the Local Initiation Fee is more than $40.00 but not more than $50.00, the Federation Initiation Fee shall be an additional $22.00.

If the Local Initiation Fee is more than $50.00 but not more than $100.00, the Federation Initiation Fee shall be an additional $30.00.

If the Local Initiation Fee is more than $100.00, the Federation Initiation Fee shall be an additional $40.00

No Federation Initiation Fee shall be assessed on any member who is already a member in good standing of any Local of the A. F. of M. The present ceiling on Local Initiation Fees shall be increased from $100.00 to $150.00.

"4. Each Local shall maintain Local regular periodic dues at no less than the rates existing on June 1, 1963, plus $6.00 per annum. Such rates may be reduced with the consent of the International Executive Board.

"5. No Local shall require any traveling member of the Federation who is not a member of such Local to make any payment based on regular periodic dues of such Local unless such member has performed within the jurisdiction of such Local for at least four (4) consecutive weeks. No such payment shall exceed the rate of regular periodic dues of such Local less the amount included therein for Federation Per Capita Dues ($1.50 per three (3) month).

"6. No Local shall require any member of the Federation who is not a member of such Local to pay any dues based upon earnings ('taxes') unless

such dues are uniformly imposed by such Local upon its own members; but no such dues shall be payable by traveling members performing symphony, or opera services.

"7. Any traveling member failing to pay the lawfully imposed dues of a Local of which he is not a member shall be subject to automatic expulsion from the Federation.

"8. Present provision establishing minimum wages for traveling engagements at 10% in excess of applicable Local scales shall be reaffirmed."

It should be noted that the substantive provisions of paragraphs 1-8 of Recommendation No. 11 are identical with those contained in Recommendation No. Two, except for $6, instead of $8, per capita dues, and the exceptions made with respect to life and honorary members.

25. Shortly after noon on June 12, 1963, the Chairman of the Law Committee made a report concerning the work of the Joint Committee. The Official Proceedings contain the following statement regarding his report and the adoption of a resolution to hold a night session (Exh. B, p. 52):

"Chairman Davis of the Law Committee reports that the Joint Committees of Law and Finance met the previous evening until the early hours of the morning and again this morning. He announces that the joint Committees have a recommendation to submit concerning the recommendations and resolutions dealing with the Federation's fiscal policy and feel that the delegates should have a copy of this recommendation before them when debate takes place."

"The Committees therefore recommend and Delegate Davis so moves that this Convention consider

an evening session tonight starting at 8:00 P. M. to consider this matter.

"The Motion is seconded and carried."

The possibility of the holding of a night session had been adverted to on the opening day of the session by Delegate Davis. The Official Proceedings state (Exh. B, p. 34):

"A motion was made by Delegate Davis, Local 60, that the Convention reconvene on Tuesday, June 11th at 11:00 A. M. and continue until 4:00 P.M., and that these hours prevail during the Convention which is to be in session every day until adjournment. If the Convention determines an evening session is necessary, such session shall convene at 8:00 P. M.

"No objections."

26. Copies of Recommendation No. 11 were distributed to all the delegates during the late afternoon and early evening of June 12. It was considered by the Convention between the hours of approximately 8:15 P. M. on June 12 and 2:30 A. M. on June 13. During the course of its deliberations, a motion was made that the resolutions in Recommendation No. 11 be considered seriatum, but "without making any decision until the full recommendation has been discussed" (Exh. B, p. 56). This motion was voted down by the delegates (Exh. B, p. 56). After Recommendation No. 11 was submitted to a voice vote of the delegates, the Chairman of the convention announced that "The ayes and nays appeared to be of equal response" (Exh. B, p. 58). A delegate, speaking on behalf of various locals, thereupon requested a roll call in accordance with the provisions of Article 5 of the Constitution*. The Chairman announced

* As noted above, Article 5 provides that "On questions affecting a change in the laws each Local may, upon roll call, cast as many votes as it has members as per book of the Treasurer, A. F. & M."

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that a roll call vote would be taken and that delegates representing locals would have the option of voting as a unit, based upon the membership of their locals, or to split their votes. After the roll call vote was taken, the Chairman announced that 158,068⅔ votes were cast in favor of Recommendation No. 11 and 113,742⅓ were opposed (Exh. B, p. 63).

27. On June 13, 1963, the Convention Committee, which consisted of the officers of the Federation, its International Executive Board and the Chairman of all Committees of the convention, and which met pursuant to the provisions of Article 5 of the Constitution, approved of the adoption of Recommendation No. 11 (Exh. B, p. 77).

28. I have been a member of Local 77, American Federation of Musicians since 1943. I became Secretary of Local 77 in 1943; an Assistant to the International Secretary in 1952 and Assistant Secretary in 1959. I have attended every Convention of Federation from 1944 to date with the exception of the 1952 and 1953 Conventions. As a result of the many years that I have attended Conventions and more particularly as an executive of the Federation, I am fully familiar with the procedures followed by Federation at the Annual Convention.

29. The practice which has been uniformly followed by Federation over the years has been that recommendations proposed by the International Executive Board are submitted to the delegates at the opening of the Convention or at such other times as the delegates at the particular Convention may determine. Furthermore, it has never been the practice of Federation to send such recommendations to delegates in advance of the Convention.

30. The practice of Federation has been for delegates at the Convention to determine whether night sessions will be held. It has never been the practice to notify delegates

in advance of a Convention that night sessions would be held.

31. The procedures followed at the 1963 Convention with respect to the recommendations involved in this action and the procedures with respect to the night session were in strict conformity with the well established past practices of Federation.

32. I attended every session of the 1963 Convention. As Assistant Secretary of the Federation, with rare exception, I attend all meetings of the International Executive Board and I attended almost every meeting of that Board which is referred to in this affidavit. I prepared the minutes of most of the meetings of the International Executive Board. I also receive minutes and reports of Regional Conferences and of meetings of Locals attended by Federation officers. Accordingly, all of the matters referred to herein are either known to me by virtue of my attendance at the sessions and meetings above referred to or are based upon documents which come into my hands as Assistant Secretary.

33. In view of the facts set forth in this affidavit, I specifically deny the following allegations of fact which are contained in the complaint:

(a) that the delegates received less than six hours notice of Recommendation No. 11 (Compl't, pars. 22, 23, 31, 35-38, 47, 48);

(b) that the holding of a night session to consider Recommendation No. 11 was improper (Compl't, pars. 27, 35, 43, 46, 48);

(c) that the provisions of Federation's Constitution and By-laws were not followed with respect to the printing, distribution, and voting upon Recommendation No. 11 (Compl't, pars. 56-59, 61, 62);

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(d) that Recommendation No. 11 was "railroaded" through the Convention and that the officers of Federation exerted improper influence on the delegates with respect to that Recommendation (Compl't, pars. 23, 25, 26, 32, 43, 47, 48, 49, 50, 51, 65, 66);

(e) that officers of the Federation required the delegates to vote on Recommendation No. 11 as a package (Compl't, pars. 41, 49).

WHEREFORE, defendant's motion for summary judgment dismissing the complaint should be granted.

GUY SCOLA.

(Sworn to September 18, 1963.)

(Exhibits omitted)

Affidavit of Max L. Arons, Sworn to September 18, 1963, Read in Support of Defendants' Motions for Summary Judgment

(Wittstein R. 235-43)

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE.]

STATE OF NEW YORK }
COUNTY OF NEW YORK } ss.:

MAX L. ARONS, being duly sworn, deposes and says:

1. I am the Secretary of Associated Musicians of Greater New York, Local 802 of the American Federation of Musicians of the United States and Canada.

2. I attended the 1963 annual convention of the Federation as one of the delegates from Local 802 and I am fully familiar with the proceedings at the Convention.

3. I have read the affidavit of Guy Scola, sworn to September 18, 1963, and I concur fully with the facts stated therein. I have personal knowledge of the truth of the matters referred to in paragraphs 1-11, 18-19, 22-27, 29-31 of that affidavit. As to the other matters referred to by Mr. Scola, they are true according to my information and belief, which is based on documents I have seen, reports which have been made to me as Secretary of Local 802, and numerous conversations I have had with officers of Local 802 and the Federation, and various members of the Federation, including fellow delegates to the 1963 annual convention.

4. I state without reservation that the charge in the complaint that Recommendation No. 11 was "railroaded" through the Convention is false. Recommendation No. 11 was passed only after the fullest possible consideration by the delegates, all of whom were given full opportunity to present their views on the question, and I know of no pres-

Affidavit of Max L. Arons, Sworn to September 18, 1963, Read in Support of Defendants' Motions for Summary Judgment.

sure brought on me or any other delegates to the Convention to cast our votes one way or the other. Indeed, I and my fellow delegates from Local 802, Hyman B. Jaffe, cast over 28,000 votes on behalf of Local 802 against Recommendation No. 11.

5. It was common knowledge among the delegates well before the Convention even opened that they would have to consider and pass upon suggestions for drastic changes in Federation's fiscal policy and that for two weeks before the Convention the International Executive Board was meeting to consider what, if any, recommendations it would make with respect to this matter. As early as May 7, 1963, more than a month before the Convention, I and all other Local officers received a letter from President Kenin in which he informed us that the Convention would probably have to consider revision of Federation's fiscal policy (Scola Aff. Exh. E).

6. The main topic of discussion among the delegates before and during the first three days of the Convention was the revision of Federation's fiscal policy and "Recommendation No. Two" of the International Executive Board which, as noted by Guy Scola (Scola Aff., par. 19), was distributed to the delegates at the opening of the Convention and which, in respect to fiscal policy, was similar to Recommendation No. 11, except as to the amount of per capita dues and provision for certain exceptions for life and honorary members.

7. I was a member of the Law Committee of the Convention and thus a member of the Joint Law and Finance Committee at which Recommendation No. Two was considered and discussed. During the first three days of the Convention, the Joint Committee held extensive meetings, all of which I attended and at least one of which lasted until the early hours in the morning. At these meetings all

Affidavit of Max L. Arons, Sworn to September 18, 1963, Read in Support of Defendants' Motions for Summary Judgment.

delegates who wished to be heard were given a full opportunity to present their views. At all times the discussions of the Joint Committee were free from any improper pressure from the officers of Federation and were conducted with complete fairness to all points of view.

8. After the Joint Committee had concluded its study of Recommendation No. Two of the International Executive Board, the Committee felt that it was desirable, in view of the importance of the question, to print its suggested modifications of Recommendation No. Two in the form of a separate Recommendation of the Committee instead of merely reporting its suggested modifications orally to the Convention. The Committee also felt that the importance of the question warranted holding an evening session of the Convention to consider it. These facts were specifically communicated to the Convention by Delegate Davis, who was Chairman of the Law Committee. (Scola Aff., par. 25) As a result of the Convention's approval of the night session, the Committee caused to be printed Recommendation No. 11, which was distributed to the delegates during the late afternoon and early evening of June 12.

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9. Upon information and belief, on or about July 23, 1963, a letter (a copy of which is annexed hereto as Exhibit A) was sent by Orchestra Leaders of Greater New York to numerous members of Local 802 and other locals of the Federation. That letter states, in part (par. 16):

> "16. In a short while, two additional actions will be launched against the A. F. M. and LOCAL 802, respectively. The first of these two new actions will challenge the legality of the Convention proceedings which resulted in the adoption of 'Recommendation No. 11'. The second will challenge, *on behalf of*

sidemen, the collection of Local 802 Taxes directly from sidemen without amendment of the present (illegal) By-Laws (which require that such taxes be collected by orchestra-leader-employers)."

10. The letter of July 23, which predicted the commencement of an action attacking "the legality of the Convention proceedings which resulted in the adoption of 'Recommendation No. 11'" is dated approximately one month prior to the commencement of the within action, which is clearly the action above referred to in that letter.

11. I am informed by counsel that Section 101(a)(4) of the LMRDA provides that "no interested employer or employer association shall directly or indirectly finance, encourage, or participate in, except as a party" any action under Title I of the Act.

12. I am informed by counsel that in several actions in this Court against Local 802 and Federation, it has been asserted that Orchestra Leaders of Greater New York ("OLGNY") is an association of orchestra leaders who consider themselves to be employers. I am further informed by counsel that this Court has found a number of them to be employers in the single engagement field in its previous decisions in the Carroll 302 and Cutler actions (60 Civil 1169, 4025 and 62 Civil 2552, respectively).

13. As appears from Exhibit A, OLGNY and many of its "employer" members have been financing, encouraging or participating in this action, although OLGNY is not a party to this action and only two or three of its members are parties.

WHEREFORE, defendant's motion for summary judgment dismissing the complaint should be granted.

MAX L. ARONS

(Sworn to September 18, 1963.)

(Exhibit omitted)

Affidavit of Robert Crothers, Sworn to September 18, 1963, Read in Support of Defendants' Motions for Summary Judgment

(Wittstein R. 244-46)

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE.]

STATE OF NEW YORK }
COUNTY OF NEW YORK } ss.:

ROBERT CROTHERS, being duly sworn, deposes and says:

1. I am the Supervisor of the Information Department of the Treasurer's office of the American Federation of Musicians. I make this affidavit in support of defendant's motion for summary judgment dismissing the complaint herein.

2. On September 18, 1963, Federation received a copy of the September 1963 issue of "Crescendo", the monthly publication of Local 149 of Toronto. On page 11, a copy of which is annexed hereto as Exhibit A, there is a report by the delegates of Local 149 concerning proceedings at the 1963 Federation annual convention.

3. I attended every session of the 1963 annual convention, including every meeting of the Joint Law and Finance Committee. I also attended most of the meetings of the International Executive Board, which were held during the two weeks prior to the convention. The report of the Local 149 delegates, to my own personal knowledge, is a true and accurate description of the events which transpired at the convention.

4. I have read the affidavit of Guy Scola, sworn to September 18, 1963, and I concur fully with the facts stated

therein in paragraphs 3-11, 14-27 and 29-31, which are true to my own personal knowledge.

5. I have read the affidavit of Max L. Arons, sworn to September 18, 1963, and I concur with the facts stated therein in paragraphs 1-2 and 4-8, which are true to my own personal knowledge.

ROBERT CROTHERS

(Sworn to September 18, 1963.)

(Exhibit omitted)

Plaintiffs' Statement Under Rule 9(g) in 63 Civil 2548

(Wittstein R. 178-81)

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE.]

SHORT AND CONCISE STATEMENT OF THE MATERIAL FACTS AS TO WHICH PLAINTIFFS CONTEND THAT THERE EXIST GENUINE ISSUES TO BE TRIED.

1. That no interested employer or employer association has, directly or indirectly, financed, encouraged or participated in this action except as a party in violation of Section 101(a)(4) of Title I of the Act; as to which defendant, by the affidavit of Max L. Arons, sworn to on September 18, 1963, falsely avers (paragraphs 11, 12 and 13) that there has been direct or indirect financing in violation of that section.

2. That plaintiffs, Eddie Wittstein, Ben Cutler, Marty Levitt, George Auld, Leo Greco, Hector De Rienzo, and Matt Gillespie, are employers; and that plaintiff, Claude

Garreau, is an independent contractor and as such is self-employed.

3. That plaintiffs, Marty Levitt and Milton Farowitz, are members in good standing of defendant union and are entitled to be so recognized.

4. That all plaintiffs have played in and do accept engagements or employment, respectively, in both the *single engagement field* and the *steady engagement field.*

5. That the delegates at the Federation's 1963 Sixty-Sixth Convention received less than six hours notice of Recommendation No. 11.

6. That Recommendation No. 11 was "railroaded" through the Convention.

7. That in all of the factual circumstances described in the complaint, the holding of the night session to consider Recommendation No. 11 was improper and in violation of the Act, as asserted in the complaint.

8. That with respect to the distribution, consideration and passage of Recommendation No. 11, the provisions of defendant's Constitution and By-laws were not followed.

9. That the voting procedure used for the passage of Recommendation No. 11 violated the Act, because it gave 26,000 members of the Federation a double or triple vote.

10. That the officers of Federation arranged matters at the Convention in a manner to require the delegates to vote on Recommendation No. 11 *as a package.*

11. That Recommendation No. 11, when presented to a voice vote of the delegates was actually defeated by them

in the course of such vote: and that thereupon the President of the Convention *falsely* asserted: "The ayes and the nayes appear to be of equal response."

12. That in fact, the *delegates* did not vote for the passage of the Recommendation No. 11, as they were required to by the Act.

13. That defendant and its officers so conducted the Convention as to maintain complete control and domination over it.

14. That defendant's officers violated their fiduciary responsibility under Section 501 (a) of the Act and their duty as trustees to make full disclosure by failing to give due and proper notice of Recommendation No. 11 and by concealing that Recommendation until very late in the Convention and by waiting until the end of the Convention before proposing to the delegates their proposed solution of a problem which they recognized as existing for more than a year prior to June 10, 1963, when the Convention began and when they finally got down to a proposal of their own.

15. That all of the facts and circumstances preceding and surrounding the "unusual night session" were such as to constitute that "unusual night session" a "special convention" within the meaning of Section 101 (a) (3) of the act.

16. That defendant and its officers intended to deceive and did actually deceive large numbers of the attending delegates at the Sixty-sixth Convention by the language of their Recommendation No. 11. For example: defendant and its officers falsely labeled certain "taxes" as "dues"; and they falsely asserted in Recommendation No. 11 that there was a "present provision establishing minimum wages for traveling engagements at 10% in excess of applicable Local scales," when in fact and in truth there is not

now and there never were such provision, falsely labeled as a "present provision" in paragraph numbered 8 of Recommendation No. 11.

17. That one of the methods by which defendant and its officers maintained complete control and domination over the Sixty-Sixth Convention was by their power of appointment of Convention Committees; and that such power of appointment was exercised in a manner to push Recommendation No. 11 through the convention. Defendant's officers by their selection of committeemen and committee chairmen who could be depended on to do defendant's bidding, dominated the Convention.

18. That defendant's By-laws, in all the factual circumstances, required that Recommendation No. 11 should have been printed and distributed to the Convention delegates, at the very first session (June 10, 1963) of the Convention; and that this By-law, was, in that respect, violated.

19. That the Convention, under the domination and control of defendant and its officers, continued in full force and effect the illegal "traveling surcharge" and "local tax" provisions which had been condemned by authoritative decisions of this Court and of the United States Court of Appeals.

Defendant's Statement under General Rule 9 (g), by contradicting many allegations of the complaint, demonstrates the existence of material issues of fact which need to be tried.

Dated: September 23, 1963.

GODFREY P. SCHMIDT
Attorney for Plaintiffs
Office & Post Office Address at
60 East 42nd Street
New York 17, New York MU 7-1950

Affidavit of Godfrey P. Schmidt, Sworn to September 25, 1963, Read in Opposition to Defendants' Motions for Summary Judgment

(Wittstein R. 182-215)

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE.]

CITY, COUNTY AND STATE OF NEW YORK:

GODFREY P. SCHMIDT, being duly sworn, says:

1. I am attorney for plaintiffs herein; and I personally prepared their complaint, which is the subject matter of defendant's motion for summary judgment.

2. This affidavit is prepared for the purpose of calling to this Court's attention certain facts and defendant's admissions which demonstrate that defendant's motion for summary judgment is ill-founded.

3. Several of the allegations of the complaint allege that the Act (especially Title I thereof) was violated by defendant in its enactment of Recommendation No. 11 at defendant's Sixty-sixth Convention; because the equal rights and privileges of defendant's members were violated by the voting procedure employed in that enactment. One of the bases of the complaint was the fact that the ballots of many members were counted by defendant two, three and possible four times, since each Local represented at the Convention was permitted to vote as many ballots as it had members. Thus, in cases where a member belonged to a number of AFM Locals simultaneously, that member's ballot was counted several times. If he belong to two AFM Locals, it was counted twice. If he belonged to three AFM Locals, it was counted three times, Etc. It is significant that the Scola affidavit (Paragraph 3) sworn to on September 18, 1963, and submitted in support of the motion for summary

Affidavit of Godfrey P. Schmidt, Sworn to September 25, 1963, Read in Opposition to Defendants' Motions for Summary Judgment.

judgment, admits that *approximately 26,000 AFM members belong* to two or more Locals. (Hereinafter the Scola affidavit and its Exhibits will be referred to as follows: "S.A. Para. ..... and S.A. Exhibit .....")

4. The affidavits and exhibits submitted in support of defendant's motion for summary judgment make it clear that prior to and during the Convention defendant and its officers constantly misled the delegates (and members) as to the significance of the decisions of this Court and of the United States Court of Appeals for the Second Circuit on the subject of the 10% "traveling surcharge" and the local taxes. This misrepresentation was material and serious; because it involved the basic question of the actual situation that needed remedy as well as the remedy which the delegates were called upon to adopt to correct the illegalities practiced by the defendant and its officers. Almost from the date of the first decisions adverse to defendant and to Local 802, AFM and Local officers kept repeating *(orally,* in Allegro, in International Musician, in leaflets, in booklets and in other union propaganda) that the only thing the Courts had found was "that the method of collection of the traveling surcharge and of the local taxes was illegal." The entire question of the *employer status* of orchestra leaders and of the consequences of that status was side-tracked and left out of consideration. There was no real explanation of the antitrust actions, of the consequences of the systematic refusal of AFM unions to bargain collectively, of their combinations with employers, of the fact that the above-entitled action involved steady engagements as well as single engagements and of the various findings of this Court. What the Courts actually did was to find that *certain Union By-laws were illegal* because those By-laws placed upon *employers* within the union (orchestra leaders) a duty (a) to pay *taxes (not dues)* for themselves; (b) to collect such taxes from their sidemen-employees (without

any written authorization from those employees); and (c) to pay contributions ("surcharges") into a Local 802 Welfare Fund which clearly violated the Taft-Hartley Act. At no time did defendant or its officers, even though they were and are fiduciaries, ever honestly admit their own error or confront the delegates (or the Locals or their members) with all the relevant facts. Thus defendant's officers in their efforts to save face violated their fiduciary responsibilities to the membership. This face-saving is made plain by the very submission presented by defendant in support of its motion for summary judgment, as hereinafter appears.

5. It is true that, on or about December 5, 1962, defendant mailed a twelve page, printed message from President Kenin to Union members. (S.A. Exhibit E) But this message itself emphasizes and confirms plaintiffs' contention that defendant's officers violated their fiduciary responsibilities under Section 501(a) of the Act by misleading the Convention delegates (and the membership) as to the significance of the decisions of this Court and of the Court of Appeals. For example, on page 2 of "An Important Message from President Kenin about the Surcharge", (S.A. Exhibit E) Mr. Kenin writes:

> "Now, please note this carefully: *the surcharge itself was not attacked. Only the thirty-year-old method of its collection—by the leader-'employer'—was questioned.* In other words, if on a specific engagement, the leader is not an 'employer', no claim was made that anything is wrong in the leader's performing his Federation membership obligation by collecting and transmitting the surcharge for himself and the sidemen." (emphasis in the original)

6. In other words, Mr. Kenin is advising the members, who make no legal distinctions, that (despite the require-

ments of the Taft-Hartley Act as amended) there is no requirement that sidemen employees sign authorization and that a check-off system can be legitimate without a collective bargaining agreement. Moreover, S.A. Exhibit E does what defendant's officers have constantly done: it assures the membership that there is a different rule under Section 302 of the Taft-Hartley Act for steady engagements; and that the Court decisions serve as precedents only for single engagements (as if Section 302 made a distinction between employers in the single engagement field and those in the steady engagement field):

> "The new preliminary injunction only affects surcharge collections on single and 'miscellaneous' engagements from these plaintiff leaders. *It does not apply to steady engagements.* No court has held or even suggested that the surcharge is illegal when applied to steady engagements." (emphasis in the original)

7. This misrepresentation (in the last sentence quoted above) entirely neglects the fact that even in those relatively few steady engagements where the orchestra leader is a genuine *employee*, the Union expects deductions to be made for the "traveling surcharge" without any written, employee authorization. The fact is that most orchestra leaders in the steady engagement field (regardless of the misrepresentations contained in the "Form B" Contract) are genuine employers, just as Cutler is. It is no excuse for an employer's violation of Section 302 to say that he works in the steady engagement field. All such considerations were eliminated from every communication submitted by defendant and its officers to the membership and to the delegates of the Sixty-sixth Convention; and this clearly violated their duty of full disclosure under Section 501(a) of the Act. Thus, delegates were seriously misled and

misguided by defendant's officers in considering Recommendation No. 11. So were members.

8. It is ironic that S.A. Para. 15 quotes from S.A. Exhibit E, the following:

> "Obviously, the only way that a union can evaluate and judge wisely on the critical problem of how much and from whom its revenues should be raised is by full discussion, debate, deliberation, and vote".

There is no doubt about the truth of this statement. It is precisely because the defendant and its officers did not think enough of their fiduciary responsibility to put this truth into effect at the Convention (and before it) that the complaint was filed. The AFM membership and delegates were prevented from evaluating and judging wisely on critical union problems (on which the delegates were called upon to vote) precisely because defendant and its officers misled them as to the significance of Court decisions (to which, even now, they literally pay no attention). There was no "*full* discussion, debate, [or] deliberation," precisely because some of the crucial issues were deliberately concealed or eliminated from consideration by defendant and its officers.

9. S.A. Para. 16 quotes Mr. Kenin's letter (S.A. Exhibit E) dated May 7, 1963. That letter itself corroborates plaintiffs' contention that defendant's officers violated their fiduciary responsibility: and that defendant misled and misguided the delegates, so that they did not really understand the problem that they were expected to vote on:

> "I have previously advised you of the history and status of the court cases involving the method of collection of the Federation's traveling surcharge and of some local's taxes. • • •

Affidavit of Godfrey P. Schmidt, Sworn to September 25, 1963, Read in Opposition to Defendants' Motions for Summary Judgment.

> *"There will of course be a full discussion of this litigation at the forthcoming convention* • • •
>
> "Meanwhile, I refer you to my message of December 5, 1962 • • • . Until further word from the Federation, *the procedures outlined in the answers to question 6, 7, 8, 9 and 10 in that letter still apply and should be followed."* (Emphasis added)

10. There was no "full discussion of this litigation" at the Convention. Defendant and its officers saw to that. Questions 6, 7, 8, 9 and 10, merely continue the defendant's policy and practice of misinforming membership and delegates:

> "6. Q. Does the new preliminary injunction require any local, other than Local 802, to change its present method of collecting its local taxes?
>
> "A. No.
>
> "7. Q. Does the new preliminary injunction require the Federation or Local 802 to change the present methods of collecting the surcharge or local tax based on 'steady engagements'?
>
> "A. *No, the court specifically denied the plaintiffs' request that the preliminary injunction apply to surcharge and local tax collections on steady engagements. The preliminary injunction applies only to surcharge and Local 802 tax collections on 'miscellaneous' or single engagements."* (emphasis in the original)

11. The uninstructed membership and delegates were allowed to conclude that, simply because the *preliminary injunction* did not apply to any Local except Local 802, all other Locals had a right to violate Section 302 of the Taft-Hartley Act, as amended; and that this violation could be

perpetrated in the steady engagement field by the Federation or its Locals. Members not versed in the law draw no distinction between the mandate of a *preliminary injunction* and the mandate of a *Statute*. Defendant and its officers sought to leave the impression that the prohibitions of *the law* applied only in respect of those plaintiff orchestra leaders who had posted a thousand dollar ($1,000.00 Dollar) bond. That is why defendant and its officers distributed, to the indiscriminate and uninstructed judgment of the members unfamiliar with the law, questions and answers like the following:

> "8. Q. Does the new preliminary injunction apply to collections of surcharge or Local 802 tax from members who have not sued the Federation?
>
> "*A. No. The injunction applies only to those who have taken the step of suing their union and who must each post a $1,000.00 Dollar bond. It does not apply to anyone else.*"
>
> "9. Q. Are other leaders expected to pay the surcharges heretofore?
>
> "A. *Yes, as noted above, the new preliminary injunction applies only to the named plaintiffs in that action. It does not apply to anyone else.* * * *" (emphasis in the original)

The law, and the predecents set by authoritative Court decisions, are negligible trivia under such instructions, which have the inevitable effect of misleading members and delegates who are untrained in the law and uninformed about the significance of the distinction between a preliminary injunction and the mandate of a statute, as authoritatively interpreted by Court decisions. Such misinformation and such failure to inform is the more serious because defendant's officers who were responsible for it were lawyers.

Affidavit of Godfrey P. Schmidt, Sworn to September 25, 1963, Read in Opposition to Defendants' Motions for Summary Judgment.

12. Defendant (S.A. Para. 17) quotes from reports sent to all of the delegates:

> "There will come of course, a full discussion at the Convention of this litigation and the consequences of this unfavorable ruling * * * [in 62 Civil 2552]." (S.A. Exhibit C)

Defendant admits and plaintiffs can prove, that there was no "full discussion at the Convention of this litigation" and of the "consequences of this unfavorable ruling". Defendant's officers violated their fiduciary responsibilities by misinforming the delegates as to the consequences of the unfavorable ruling and by suppressing important aspects of the litigation as to which full discussion was promised.

13. Defendant (S.A. Para. 18) refers to "extended discussions as to the recommendations to be placed before the delegates with respect to the problems created by the Cutler decisions" (S. A. Exhibit B, pages 361-72). These discussions allegedly took place May 30th and June 1, 3, 4, 6, 7 and 10, 1963. But, according to the very submission made by defendant in support of the motion for summary judgment, these discussions were not made available to the delegates to the Sixty-sixth Convention *until that Convention was over.* They certainly were not made available to the Locals and to the membership until the controlled Convention was concluded. Nor does Scola's affidavit, by referring to these "Minutes of the Meetings of the International Executive Board" in May and June 1963, indicate why he regarded the discussions as "extended". (Hereinafter I refer to the International Executive Board as "I.E.B.")

14. For example, here are the only entries in the May 30, 1963 Minutes that could, remotely, concern the Cutler litigation and the problems created by that litigation:

Affidavit of Godfrey P. Schmidt, Sworn to September 25, 1963, Read in Opposition to Defendants' Motions for Summary Judgment.

> "A communication is received from orchestra leader Jerry Shard regarding the 10% surcharge. In his letter, member Shard advocates that a greatly increased dues rate be put into effect in lieu of the surcharge * * * Other matters of interest to the Federation are discussed".

This session began, according to the official Minutes, at 2:15 P. M. and adjourned at 5:00 P. M. on May 30, 1963; and it was attended only by members of the I.E.B. (S.A. Exhibit B, p. 361-362).

15. I am unable to find in the Minutes of the International Executive Board for the Meeting held on June 1st, any reference whatever to the Cutler litigation or the problems created by the Cutler decision, despite S.A. Para. 18

16. The I.E.B. Minutes for June 3, 1963, show that only Henry Kaiser, defendant's General Counsel, and Jerime Adler, its New York Counsel and the members of the I.E.B. were present at that meeting; and that the discussion that day was, as reported in S.A. Exhibit B, page 363, indecisive and merely explanatory:

> "Attorneys Kaiser and Adler explain the status of litigation to date, concerning the OLGNY and the AFofM. Legal analysis of the recent decision of the Circuit Court of Appeals is given.
>
> "There is a thorough discussion concerning this entire subject matter and counsel advises that in all probability there will be no final determination in this case before October 1963.
>
> "It is decided that regardless of the outcome of this case, a different type of revenue raising procedure should be enacted.***
>
> "The International Executive Board reverts to a study of the Federation's fiscal policy. Considera-

> tion is given regarding the validity of the Convention authorizing the International Executive Board to act on the subject matter in the event the United States Supreme Court rules on the 10% 'surcharge'. A proposed plan based on an increased per capita tax is thoroughly studied * * *" (S.A. Exhibit B, p. 363)

The "legal analysis of the recent decision of the Circuit Court of Appeals" was never made public to the delegates, or members, or Locals before (or after) the Convention. Despite the fact that the delegates sorely needed information such as this legal analysis would give them, defendant's officers not only avoided such candid disclosure of the legal situation, but also misrepresented the legal situation. The I.E.B. Minutes quoted above were never publicized until after the Convention. Even if they had been publicized, these Minutes would not have been informative or useful to the delegates. The quoted Minutes demonstrate that despite the many months of previous warning given by decisions of this Court, defendant's officers first began seriously to consider a course of action respecting the problems created by the Cutler decision on June 3, 1963, while they were in session at Miami Beach, Florida, making preparation for the Convention which was to begin seven days later: Why didn't these officers publish the "proposed plan" for increased per capita tax (which they say they thoroughly discussed on June 3rd?) on that day or immediately afterwards. Someone had to write this "proposed plan" prior to its consideration on June 3rd. Why didn't defendants officials think enough of their fiduciary responsibility to broadcast in timely fashion at least, something about this plan to increase the per capita tax?

17. After 2:00 P.M. on June 4, 1963, the I.E.B. and attorneys Kaiser and Adler met until 5:30 P.M.; and their

discussion is described in the Minutes (S.A. Exhibit B, p. 366) as follows:

> "Further consideration is given regarding the Federation's fiscal policy and proposed changes in by-laws regarding locals' fight to impose job and other dues. There is a detailed discussion concerning this matter."

Again, this entry would not have been helpful to the delegates had they been given it. Actually, it was first published after the Convention was; and the submission made by defendant in support of its motion for summary judgments indicates that the substance of the discussion thus summarized in the foregoing quotation was never given to the delegates during the Convention.

18. The meeting of the I.E.B. held on June 6, 1963, is especially interesting. The afternoon session began at 2:00 P.M. Then *for the first time* were mere delegates of the 66th Convention permitted to attend the august gathering of I.E.B. members and attorneys Kaiser and Adler. Who were these specially honored delegates? They were (S.A. Exhibit B, page 369) Howard P. Greene of Local 5, Detroit, Michigan; Hal C. Davis of Local 60, Pittsburgh, Pennsylvania; Victor Fuentealba of Local 40, Baltimore, Maryland; David Winstein of Local 174, New Orleans, Louisiana; and Harry Chanson of Local 308, Santa Barbara, California. How did it come about that, out of 1219 Convention delegates, these five delegates were permitted to attend the I.E.B. meeting of June 6, 1963? The answer to this question is that this tight little clique was chosen to work with defendant's officers in controlling and dominating the Convention, as the "Official Proceedings" makes clear they did, and as will become apparent below. Meanwhile, it is important to quote the official description of

what was discussed by or with these gentry (S.A. Exhibit B, page 370):

> "President Kenin explains the Federation's fiscal problem which has arisen in view of the adverse court decisions in the litigations of the Orchestra Leaders v. the A. F. of M.
>
> "The entire assemblage participates in discussions pertaining to this matter.
>
> "Henry Kaiser gives details of various plans to raise revenue.
>
> "The delegation is excused • • •"

19. The I.E.B. Meeting on the next afternoon (June 7, 1963) was even better attended than the meeting on the previous day. It began at 2:00 P. M. Again, privileged delegates were admitted to the high assemblage, along with Attorneys Kaiser and Adler and all of defendant's "Traveling Representatives" and "Assistants to the President" (S.A. Exhibit B, pages 370-371). The delegates privileged to be included in this arcane gathering were:

Victor Fuentealba, who later was chosen by Mr. Kenin as Chairman of the "Good and Welfare Committee."

David Winstein, who later was chosen by Mr. Kenin as Chairman of the "Credentials Committee."

Herb MacPherson, who later was chosen by Mr. Kenin as Chairman of the "Location Committee."

Harry Chanson, who later was chosen by Mr. Kenin as Chairman of the "Finance Committee."

Hal C. Davis, who later was chosen by Mr. Kenin as Chairman of the "Finance Committee."

Howard P. Greene, who later was chosen by Mr. Kenin as a member of the "Law Committee".

Here is the official description of the long discussion which took place between these behind-the-scenes characters:

Affidavit of Godfrey P. Schmidt, Sworn to September 25, 1963, Read in Opposition to Defendants' Motions for Summary Judgment.

"President Kenin explains the background of the history of the 10% surcharge and the effect of the decision of the Circuit Court of Appeals.

"Attorney Kaiser explains *the proposed fiscal plan* which is fully considered and discussed by all those present.

"Discussion is held with Herb MacPherson, Chairman of 'Location Committee' and delegate Chanson regarding the convention site for 1964. • • •

"Discussion is held regarding personnel managers.

"The session adjourns at 7:00 P. M." (emphasis added)

20. Insistently the questions obtrude: "What was the proposed fiscal plan?" Why wasn't it published before the Convention? Why were five or six select delegates permitted to attend these obrepetitious meetings of the I.E.B. three and four days before the other delegates gathered for the Convention?" The answers are now obvious from the very documents supplied by defendant. Here were the men who, in addition to defendant's officers, were to control the Convention. They all came from influential Locals with relatively large memberships. They were all very close to and friendly with Mr. Kenin and his allied officials of the A. F. of M. They could be relied on. That is why Kenin appointed them to these positions of key importance to the operation of the Convention. It was no accident that at the Convention, a few days afterwards, Mr. Davis was elected as a member of the I.E.B. Nor was it an accident that the Joint Committee, comprising the Law Committee with its Chairman, Hal C. Davis, and the Finance Committee with its Chairman, Harry Chanson, were later entrusted by defendant and its officers with the critical task of approving Recommendation No. 11, the single most important item on the agenda of the Conven-

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tion. Defendant and its officers earnestly desired enactment of Recommendation No. 11. Mr. Kenin adroitly picked a handful of friendly delegates and put them in key positions on controlling committees to dominate the Convention in a manner that would not make it apparent to the delegates themselves that they were being dominated or that it was really the defendant's officers who were dominating them.

21. The leading role played by Davis and the others is clear from many pages of "Official Proceedings". To cite a few instances:

(a) "Delegate Davis, Local 60, moves that this Convention ratify the President's appointment of the 'Credentials Committee' * * *" (S.A. Exhibit B, page 32)

(b) "A resolution was introduced by Delegate Davis, Local 60, that the President appoint the following committees:

Law	23 Members
Finance	23 Members
Measures and Benefits	23 Members
Good and Welfare	23 Members
Organization and Legislation	23 Members
International Musicians	23 Members
President's Report	23 Members
Secretary's Report	23 Members
Location	23 Members

(S.A. Exhibit B, page 33)

(c) "A motion was made by Delegate Davis, Local 60, that the Convention reconvene on Tuesday, June 11, at 11:00 A.M., and continue until 4:00 P.M. and that these hours prevail during the Convention

which is to be in session every day until adjournment. If the Convention determines an evening session necessary, such session shall convene at 8:00 P.M." (S:A. Exhibit B, page 34)

22. Obviously defendant, through its officers and through the select junta of six specially useful and empowered delegates had already planned on June 6 and 7 at the conclaves of the I.E.B. described above that an "evening session" would be needed to railroad through the Convention defendant's Recommendation No. 11. Mr. Davis (*supra* "(c)") very diplomatically and craftily paved the way for an evening session. After all, there is nothing like a long evening session (lasting until 3:00 A.M., according to Exhibit A annexed to the affidavit of defendant's Supervisor, Robert Crothers) to get what you want from tired delegates who lose the will to resistance in proportion as the hour grows later.

23. Delegate Davis of Local 60 proved to be a real work horse for the officers of the A. F. of M. throughout the Convention. He appears everywhere in the "Official Proceedings". He became the Chairman of the Joint Committee which formulated defendant's Recommendation No. 11 and which, of course, nursed it through the Convention. He also participated in doing whatever defendant's officials wanted done. Here are a few examples, from many that could be quoted from the "Official Proceedings":

(a) "Delegate Davis, Local 60, moves that resolutions may be introduced up to 12:00 Noon on Tuesday, June 11.

"The motion is seconded and carried.

(b) "Delegate Davis, Local 60, moves that memorial services be held on Wednesday, June 12 at 11:00 A.M." (S.A. Exhibit B, page 34)

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(c) "The Committee on Law reports through Chairman Davis." (S.A. Exhibit B, page 39)

24. The Minutes of the second day of the Convention show that Mr. Hal Davis' Law Committee was completely successful in all its reports and recommendations. "Resolution No. 11" (not to be confused with "Recommendation No. 11") was opposed by Chairman Davis and his Law Committee reported it *unfavorably*. Of course, "Resolution No. 11" was *not* enacted. (S.A. Exhibit B, pages 39 and 40). Likewise, "Recommendation No. 1" which the Law Committee reported favorably *was* adopted by the Convention. (S.A. Exhibit B, page 40) As to "Resolution No. 3", the report of the Committee was unfavorable and the Convention obligingly adopted the report of the Committee. (S.A. Exhibit B, page 41)

25. Chairman Fuentealba and his "Good and Welfare Committee" were equally successful. That Committee's report was adopted with respect to Resolutions #5, #9, #12, #13, #20 (S.A. Exhibit B, page 49-51)

26. Chairman Davis of the Law Committee again comes into prominence in the following quotation from the Minutes of the Convention:

> "Chairman Davis of the Law Committee reports that the joint committees of Law and Finance met the previous evening until the early hours of the morning and again this morning. He announces that the joint committees have a recommendation to submit concerning the recommendations and resolutions dealing with the Federation's fiscal policy and feel that the delegates should have a copy of this recommendation before them when debate takes place.

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"The committees therefore recommend and Delegate Davis so moves that this convention consider an evening session tonight starting at 8:00 P.M. to consider this matter.

"The motion is seconded and carried." (S.A. Exhibit B, page 51)

27. It is obvious from the above that the pattern had been fixed in the pre-convention meetings of the I.E.B. on June 6 and 7 (described above) and that specially favored delegates, like Mr. Davis and the others who had been permitted to attend the I.E.B. camarillas, were cutting the cloth at the Convention to conform with that pattern. Indeed, I have read the "Official Proceedings" of the Sixty-sixth Annual Convention (S.A. Exhibit B) from cover to cover; and I have been unable to find any instance (out of 58 resolutions acted on by the delegates) where the complaisant delegates failed to follow the recommendation of the involved Committee chosen by Mr. Kenin. In a number of instances, proposals, as made by given proponents at certain moments of the Convention, were afterwards conveniently *withdrawn* by those proponents. It is impossible to tell from the "Official Proceedings" who finally persuaded the proponent to withdraw. But in view of the subservience of most of the delegates, it is safe to surmise that the various rigged committees chosen by Mr. Kenin performed their work of dominating and controlling the Convention with great efficiency. It was no mere coincidence that the locals to which Davis, Greene, MacPherson, Fuentealba, Winstein and Chanson belonged voted unanimously for Recommendation No. 11.

28. It is also clear from the "Official Proceedings" (S.A. Exhibit B) of the Convention that at no time before the evening session on June 12, 1963, was any delegate permitted to discuss on the Convention floor defendant's

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Recommendation No. 11; and those "Official Proceedings" indicate that the text of Recommendation No. 11 was submitted to the delegates at the beginning of the "evening session", which is better called the "midnight session".

29. At the "evening session" on June 12, 1963, defendant's Recommendation No. 11 was presented to the assembled delegates by Hal B. Davis, Chairman of the Law Committee, and Harry Chanson, Chairman of the Finance Committee. It will be remembered that the Law Cominittee and the Finance Committee combined to form the "Joint Committee" which reported Recommendation No. 11 favorably (S.A. Exhibit B, page 36).

30. When the convention opened Mr. Kenin addressed it. The beginning of his remarks are summarized in the Minutes of the opening session (S.A. Exhibit B, page 31) as follows:

> "Taking a serious note almost at the commencement of his remarks, President Kenin said that the burning question concerned a revision of the A. F. of M.'s fiscal policy * * *"

The affidavits submitted by defendant in support of the motion for summary judgment constantly emphasize the importance of one single issue before the Convention. Mr. Max Aaron says that it was the "main topic of conversation" of the delegates for the first three days of the Convention. One would have imagined, in these circumstances, that extended debate of that issue and topic would have followed, especially after Mr. Kenin himself had stated that a "great debate" was desirable in this connection. But the Minutes of the Convention (S.A. Exhibit B, page 58) make it quite clear that there was no great debate:

> "The Convention reverts to consideration of Recommendation No. 11.

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> "Discussed by Delegates Ken Cantanzarito, Local 624; Hogan, Local 116; Pezzano, Local 85; Dow, Local 42; Liscio, Local 123; Smith, Local 380; Close, Local 146; Herman, Local 47; Jenkins, Local 267; and Chairmen Davis and Chanson.
>
> "Delegate Tomei, Local 77, discusses the matter and proposes that Resolution #16, which he introduced and which he reads, be substituted for Recommendation No. 11.
>
> "The matter is discussed further by Executive Officer Manutti, and Delegates Lambkin, Local 161, and Hoffman, Local 771.
>
> "The previous question is called for and carried. The Chair puts the question * * *".

Only fifteen delegates (S.A. Exhibit B, p. 58) out of 1219, were permitted to make comments on this all-important Recommendation No. 11. That is deplorable enough as an indication of railroading. But the conclusion that Recommendation No. 11 was ram-rodded through the Convention is startlingly confirmed when it is pointed out that of the fifteen delegates privileged to discuss the Recommendation, nine were hand-picked because they were sympathetic to the administration or part of it. Here are the details:

1. Dow of Local 42 had been appointed by Kenin to the Election Committee (S.A. Exhibit B, p. 45).

2. Catanzarito of Local 624 was selected by the administration for and was elected as an AFM Delegate to the AFL-CIO (S.A. Exhibit B, p. 57).

3. Hogan of Local 116 had been appointed by Kenin to the Committee on Measures and Benefits (S.A. Exhibit B, p. 33).

4. Smith of Local 380 had been appointed by Kenin to the Good and Welfare Committee (S.A. Exhibit B, p. 33).

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5. Davis of Local 60 had been appointed by Kenin as Chairman of the Laws Committee (S.A. Exhibit B, p. 33).

6. Chanson of Local 308 had been appointed by Kenin as Chairman of the Finance Committee (S.A. Exhibit B, p. 33).

7. Manuti of Local 802 is and was a member of the I.E.B. (S.A. Exhibit B, p. 57).

8. Hoffman of Local 771 had been appointed by Kenin, Chairman of the Presidents' Report Committee (S.A. Exhibit B, p. 34).

9. Herman of Local 47 had been appointed by Kenin to the Measures and Benefits Committee (S.A. Exhibit B, p. 33).

In other words, defendant's officers conducted the Convention debate on Recommendation No. 11 by stacking the arguments in favor of passage. Nine delegates (all administration reliables) out of the fifteen delegates allowed to speak on the subject were clearing under the influence of the administration which had appointed them to strategic positions in the Convention. They were, upon the basis of their backgrounds and connections, manifestly slanted in favor of the administration and its predelictions. The Minutes of the "evening session" (S.A. Exhibit B, p. 58) do not show what these nine delegates (administration reliables) said. But, no matter what they actually said, defendant's officers could, on the basis of their previous appointments, rely on them. Permission granted to these nine (out of fifteen) to speak on the principal question before the Convention is itself evidence of railroading. Mr. Kenin's invitation to "full discussion" and a "great debate" magically became genuine cloture under the clever manipulation of the Convention delegates perpetrated by defendant's officers and their influential cohorts, whom they

had appointed to key positions and to whom they allowed special or preferred opportunities.

31. The Minutes of the "evening session" (S.A. Exhibit B, pp. 58-63) support the complaint respecting the unfair splitting of votes on a puzzling ⅔—⅓ basis (and on other bases) having no warrant in law or by-law. The balloting was not by *delegates*, as the law requires, but by *Local memberships*. Incidentally, Scolas' affidavit erroneously asserts that the Convention delegates numbered 1176 (S.A. Para. 8). The "Official Proceedings" state in at least two places, that the number of the delegates totalled 1219 (S.A. Exhibit B, pp. 34 and 57).

32. Defendant claims (S.A. Para. 19) that Recommendation No. 2 (S.A. Exhibit F) was distributed to all delegates at the opening of the Convention on June 10, 1963; and it admits that Recommendation No. 11 (which is different in some respects from Recommendation No. 2) was submitted to the delegates (never to the *members* or to the *locals*) about *six hours before the opening of the "unusual night session"* (which, in the wee hours of the early morning, passed that Recommendation). Extended night sessions are an easy device to lessen resistance and to achieve tired if grudging concessions or consent.

> "After the International Executive Board had concluded to submit Recommendation No. 2 to the Convention, conferences attended by Federation officers and delegates * * * were held in the week prior to the opening of the Convention at which a change in fiscal policy was discussed." (S.A. Para. 20)

Scola is careful to leave to speculation the exact date when the I.E.B. "had concluded to submit Recommendation No. 2 to the Convention". He simply says: "*After*"; he does

not give the date. S.A. Exhibit B, ("Official Proceedings") page 371, lets the cat out of the bag. I.E.B. met on June 10, 1963, and was called to order by President Kenin at 7:30 A.M.:

> "Discussion is held regarding Recommendation No. 2.
>
> "It is agreed that Recommendation No. 2 shall be amended to eliminate that section dealing with exempting traveling musicians from payment of local taxes on recordings.
>
> "Discussion is held regarding whether per capita tax should apply on life members. It is agreed that this proposed increase in per capita tax shall apply on life membership, but shall apply on the life memberships granted one year after the effective date of this Resolution.
>
> "Discussion is held regarding the possibility of imposing a work dues amount based on earnings.
>
> "Study is made as to method of legally collecting such job dues.
>
> "The recommendation is that a member who fails to pay work dues is automatically suspended from membership . . .".

In other words, these efficient, alert and perspicacious leaders of Federation waited until the opening day of the Convention, (June 10th) before they paid any practical attention to this Court's decisions and to the decisions of the Court of Appeals and before they thought of informing the delegates as to their proposal for handling the problems created by the Cutler decisions. This is clear from S.A. Para. 20 and from the quotation from an address by President Kenin to a conference of Canadian Locals on June 9th:

> "He explains that the traveling musician earning 12% of the revenues pays 63% of the operations.

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> This, he says, is an immoral situation which must cease * * *. We have had an easy road up to now, said he, some locals have built their own homes with other peoples money. *We shall have to find a new formula.*" (emphasis mine)

For more than twenty years, defendant's officials were faced with this "immoral situation" and they did nothing. For five years, Mr. Kenin, himself, as President of the Federation, was conversant with this "immoral situation" and he did nothing. Now, on June 9th, 1963, the day before the Sixty-sixth Convention, he comes up with the amazing and belated realization: "We shall have to find a new formula"! He doesn't even say that one has been found or that one will be proposed. The fact that he had no solution on June 9th, and the fact that (as Scola says) the Executive Board had concluded *(when,* he does *not* say) to submit Recommendation No. 2 to the Convention leads inevitably to the conclusion that Kenin wanted the Canadians to think that, if it had come to such a decision, the I.E.B. did so on June 10th, (in view of the quotation made above from the June 10th Minutes of the International Executive Board Meeting Minutes). It is probably nearer the truth to say that the decisions were made at the I.E.B. meetings on June 6th and 7th and that Kenin was concealing this from the Canadians.

33. Nor was Mr. Kenin's address of June 10th, at the opening of the Convention, enlightening:

> "We are asking this Convention to grant a change to a responsible per capita dues basis that will insure a continuation of the International Union, he said. The Resolution proposing this change will be thoroughly considered and debated with opportunity for all to be heard." (S.A. Para. 21)

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34. As indicated above, it was not "thoroughly considered." It was presented for consideration in a context of misrepresentations by which defendant and its officers misguided the Convention and the delegates, as they had previously misguided the membership as well as the Locals.

35. Scola states:

> "On the opening day of the Convention, Recommendation No. 2 was referred to a joint committee of the Law and Finance Committees." (S.A. Para. 22)

If this is true, it was a matter of such small importance that it was not even included in the Minutes of the Official Proceedings for the opening session; nor is there any reference to any debate on that day (despite Mr. Kenin's suggestion that a "great debate" was desirable). No debate on Recommendation No. 2 took place during the opening session, as I am informed by a delegate who attended.

36. Scola asserts:

> "The Joint Committee, after studying Recommendation No. 2, and hearing the views of various delegates, concluded that Recommendation No. 2 should be adopted by the convention * * *". (S.A. Para. 23)

It should be remembered that *all* Convention Committees were appointed by Mr. Kenin, President of Federation. They were, thus, under his influence and control. Scola is not very informative on the number of these "various delegates" whose views were heard. It is common sense that the Convention delegates in any "great debate" on such an important question should have been given full opportunity to express their views. They were not given

that opportunity simply because the plan of defendant and its officers to railroad Recommendation No. 11 through the Convention was efficiently organized, as is even betrayed by Scola's own affidavit. Recommendation No. 11 resulted from the deliberations of the Joint Committee. It was printed and distributed less than six hours before the night session of the Convention (what is really a "special convention") gave its attention to the problems created by the Cutler decisions.

37.

> "Shortly after noon on June 12, 1963 [Mr. Scola inconveniently unspecific] the Chairman of the Law Committee made a report concerning the work of the Joint Committee." (S.A. Para. 25)

Obviously Recommendation No. 11 was the fruit of that "work". The Recommendation could not (as of noon, June 12th) yet have been printed for distribution to the assembled delegates; because the Chairman of the Law Committee, the ubiquitous Mr. Davis, announced "that the Joint Committees have a recommendation *to submit* concerning the recommendations and resolutions dealing with the Federation's fiscal policy and feel that the delegates should have a copy of this recommendation before them when debate takes place." (S.A. Exhibit B, p. 51) This indicates that the distribution was yet to be made when Davis made this report at the Third Day Session, called to order at 11:15 A.M. and disbanded after the election of officers (which took place at 3:30 P.M.). Most of this session had already transpired by the time Davis made this report, as appears from S.A. Exhibit B, pages 46-54.

38. Scola says (S.A. Para. 26) that copies of Recommendation No. 11 were distributed "to all of the

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delegates during the late afternoon and early evening of June 12th". Again, Scola is conveniently unspecific. What does "late afternoon" mean? What does "early evening" mean? I am informed and believe, on the testimony of a delegate who was present at the Convention, that the printed text of Recommendation No. 11 was actually distributed to the assembled delegates before the evening session on June 12 began, namely, shortly before 8:15 P.M. Thus, it *is* true, as was alleged in the complaint, that Resolution No. 11 was presented to the assembled delegates less than six hours before the vote by which that resolution was *railroaded* through passage. The Minutes of the night session (S.A. Exhibit B p 58 ff) show clearly how the railroading was accomplished. Here is a Union of 675 locals and 282,000 members (S.A. Para. 3). Here was its 66th Convention, comprising 1176 delegates, according to Scola (S.A. Para. 8), or 1219 delegates (as alleged in this complaint) according to S.A. Exhibit B, p. 57; and the "great debate", to which the President called the Convention, on a matter of such exceeding importance that the very "continuation of the International Union" depended upon it. Yet, only fifteen delegates (including the two Chairmen of the Joint Committees, Davis and Chanson, and Executive Officer Manuti) are permitted to be heard before the "previous question" is called for and carried. Who called for the "previous question" does not appear in the Minutes. But that he was inspired to do so by defendant's officers can safely be assumed.

39. I am informed by a delegate who attended the Sixty-sixth Convention (and I believe) that when Recommendation No. 11 was first submitted to *voice vote* by the delegates, the voice vote was actually in favor of the "nays". However, the Chairman of the Convention dishonestly ruled that the "ayes and the nays appeared to be of equal response."

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40. Scola is at pains to indicate (S.A. Para. 29-31) that the Convention this year was conducted in the same manner as all previous conventions had been conducted. Perhaps there can be little doubt about that. That would simply mean that all previous conventions were under the control and domination of International Officers, too. That could hardly be accidental, in view of the fact that the President of the International appoints all of the committees which make the Conventions tick.

41. Max L. Arons, in his affidavit of September 18, 1963, vigorously denies that Recommendation No. 11 was *railroaded* through the Convention. Hereto annexed marked *"Exhibit A"* to form part of this affidavit is some documentation (written by delegates who attended the Convention) which disagrees with Mr. Arons.

42. If, as Arons alleges, it was "common knowledge among the delegates well before the Convention" that they would have to consider and pass suggestions for drastic changes for the Federation's fiscal policy", no guidance, but rather misrepresentation and misguidance, about the problem came from Federation's officers, who thus violated their fiduciary responsibility under Section 501(a) of the Act. Members were not permitted to see texts of Recommendations to accomplish the so-called "drastic changes". By the manner in which the Convention was conducted, they were prevented from debating the contents of those texts, except as indicated above, in a tiring night session which itself set a limit to debate and wherein exhaustion wrung assent from flagging patience.

43. Arons would have this Court believe (paragraph 6 of his affidavit) that "the main topic of discussion among the delegates before and during the first three days of the Convention were the revision of the Federation's fiscal

policy and Recommendation No. 2 • • • which was distributed to the delegates at the opening of the Convention • • • ". The Minutes of the first three sessions of the Convention do not bear him out. If there was such a discussion, and if it was indeed a "main topic", it was certainly not important enough to record in the Convention Minutes.

44. Arons also states "that, during the first three days of the Convention, the Joint Committee held extensive meetings" Thus, he tries to leave the impression that these "extensive meetings" were concerned largely with the fiscal problem and the Cutler case problem. If this is true, it was deemed a matter of such slight importance by the draftsman of the Minutes of the Convention that those Minutes contain no notations to this effect. Arons fails to state how many delegates wished to be heard or used the opportunity to present their views. He vaguely says that *all delegates who wished to be heard were given full opportunity* to present their views. How *many?* He does not say.

45. Naively, Arons states that at all times the discussions of the Joint Committee were free from improper pressure from officers of the Federation; as if it were plaintiffs' contention that clubs or other uncouth means of violence were defendants' instruments of influence and domination over the delegates. Plaintiffs have more respect for the subtility and craft for the officers of the International than that; especially since the Convention was, as indicated above, run by those officers and their appointees.

46. Arons, too, is evasively unspecific in stating:

> "After the Joint Committee had concluded its study of Recommendation No. 2 • • • the Committee

felt that it was desirable, in view of the importance of the question, to print its suggested modifications of Recommendation No. 2 * * *."

How long after, he does not say. His statement does not disclose when these suggested modifications were printed, except (repeating Scola's formula) that Recommendation No. 11 "was distributed to the delegates during the late afternoon and early evening of June 12th".

47. Arons tries to suggest (paragraphs 11, 12 and 13 of his affidavit) that interested employers or interested employer associations have directly or indirectly financed, encouraged or participated in the preparation of the above-entitled action in violation of the Act. Actually, there had been no financing of the above-entitled action. I have not received any fee for the work that I personally, or my office, put into the draftsmanship of the complaint herein, nor for the work we are putting into these opposition papers. The fact is, however, that Section 101(a)(4) of the Act does not apply here; because the plaintiff employers are obviously *parties* to the action.

48. Arons refers to a communication distributed by the the Orchestra Leaders of Greater New York under date of July 23, 1963, entitled "FACTS WHICH AFM LOCAL OFFICERS AND OTHER MEMBERS SHOULD CONSIDER AGAINST THE BACKGROUND OF THE RECENT CONVENTION." I do not understand what possible connection this statement of demonstrable facts has with the present litigation.

49. I have reserved to the end of this long affidavit the final and perhaps the most conclusive proof of the facts:

(a) That "Recommendation No. 11" was railroaded through the Convention; and

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(b) That Mr. Kenin was guilty of fraud on the delegates and members when, on the voice vote, he ruled that the "ayes" and the "nays" were of equal response.

50. The official "Roll Call" of the Convention lists in a five-column arrangement:

(1) The "Local No.";

(2) The "Local's City";

(3) The "No. Votes Entitled to";

(4) The "Membership"; and

(5) The "Name of Delegate".

It totals (on page 8) the following Convention Statistics:

"Number of Votes	1904
Number of Locals	605
Number of Delegates	1176"

Obviously, this is the source of Guy Scola's figures noted above (S.A. para. 8). A discrepancy exists between these statistics from the official "Roll Call" and those from the "Official Proceedings" (S.A. Exhibit B p 57). But this discrepancy is not the only one presented by a comparison between the Official Proceedings and the Roll Call. The latter, as indicated above, shows that 605 locals had 1904 votes. The Official Proceedings, however, gave 1904 votes to 622 locals. How could this be? S.A. Para. 3 says that there are 675 locals. S.A. Exhibit B p 57 lists a total of 622 locals.

50. The crucial facts gleaned from a comparative analysis of the official "Roll Call", the "Official Proceed-

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ings" and the information given by delegates who were present at the Convention are the following:

1. No Local was entitled to more than 3 *delegates.*
2. No delegation was entitled to more than *10 votes.*
3. The *delegates* who came from the locals which voted *against* Recommendation No. 11 outnumbered the delegates who voted *for* that Recommendation.
4. The *Locals* voting *against* the Recommendation exceeded the number of those *Locals* voting *for* it.
5. The total number of votes which the delegates from Locals *opposing* the Recommendation had a right to cast exceeded by far the total number of votes which the delegates who *favored* the Recommendation had a right to cast.
6. Because the foregoing facts were known to Mr. Kenin from the "nays" (which were louder than the "ayes"), the system of membership-block-voting eighteen Local-blocks were *arbitrarily split;* and the various theories of splitting actually employed were not only arbitrary but inconsistent. For example, Local 24 was entitled to *seven* votes from three delegates. Its membership-block of 684 was voted as follows: 490 Yes and 194 No. By contrast, Local 204, having 541 members, had 3 delegates entitled to cast *five* votes. The membership vote was split as follows: One vote Yes and 540 votes No. Local 177 has 531 members. It sent 3 delegates entitled to cast *five* votes. Its membership was split: 177 Yes and 354 No. Local 77, by contrast, has 4,561 members and was entitled to 10 votes from its *three* delegates. Its membership was voted 3,040⅔ Yes and 1,520⅓ No etc.

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8. *Twenty-six thousand votes were counted more than once;* and of this 26,000, an indeterminate number were counted three times or more (Compare S.A. Para. 3 with S.A. Exhibit B pp. 58-63).

9. The membership-block-voting system was used to railroad Recommendation No. 11, despite the existence of serious questions about its *mathematical* (to say nothing of its *legal*) validity; because

26,000	votes were counted *more than once;*
113,742⅔	votes were counted *against* the Recommendation;
13,870	votes were *arbitrarily split;* and
2,808	votes from locals whose delegates were absent were disregarded on a matter of such importance that it deserved a referendum.
Total 156,420	

51. The cumulative effect of all the irregularities and improprieties reviewed in this affidavit is to make the vote unfair and rigged.

(Sworn to September 25, 1963.)

GODFREY P. SCHMIDT

(Exhibits omitted)

Affidavit of Ernest Neri, Sworn to September 30, 1963, Read in Support of Defendants' Motions for Summary Judgment

(Wittstein R. 266-69)

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE.]

STATE OF NEW YORK }
COUNTY OF NEW YORK } ss.:

ERNEST NERI, being duly sworn, deposes and says:

1. I am, and for the past thirteen years have been, employed by American Federation of Musicians of the United States and Canada (the "Federation") as Supervisor of the I.B.M. Department.

2. As part of my duties as Supervisor of the I.B.M. Department, it is my responsibility to keep accurate files and records of the names, addresses and Local affiliations of all of the members of the Federation. My immediate superior is Stanley Ballard, Secretary of the Federation, and in his absence my immediate superior is Guy Scola, Assistant Secretary of the Federation.

3. In 1959 Mr. Ballard informed me that as a result of the fact that certain members of the Federation were members of more than one Local, those persons were receiving more than one copy of the International Musician, an official monthly publication of the Federation. Mr. Ballard requested that I ascertain the names of those members of the Federation who belong to more than one Local of the Federation.

4. Pursuant to instructions from Mr. Ballard, I prepared and forwarded to each Local a list of the members of that Local, and a letter (Exhibit A) requesting that each

Affidavit of Ernest Neri, Sworn to September 30, 1963. Read in Support of Defendants' Motions for Summary Judgment.

Local send us the Social Security numbers of their members, except for Canadian Locals, since Canada has no Social Security.

5. All of the Locals of the Federation in the United States sent back to us the list I had prepared of their members, together with the Social Security numbers of all of their members who had Social Security numbers. I then placed the appropriate Social Security number on the I.B.M. card of each member of the Federation. Thereafter, I ascertained, through use of the I.B.M. machines, the name of each member of the Federation whose Social Security number had been listed by more than one Local.

6. After obtaining this information, I created a file which contained the names of all members of the Federation who are members of more than one Local.

7. Since the study made in 1959, my office has kept the multiple membership file up to date and, in addition, obtained the names of persons in Canada who are members of more than one Local. Furthermore, with regard to the small percentage of persons who do not have Social Security numbers, we have continuously checked our mailing addresses for the International Musician and have included in our multiple membership files those persons who do not have Social Security numbers, but who we have been able to ascertain are members of more than one Local.

8. As a result of the foregoing, the multiple membership file which the Federation maintains contains, as far as we can reasonably ascertain, the names of all the members of the Federation who belong to more than one Local.

Affidavit of Ernest Neri, Sworn to September 30, 1963, Read in Support of Defendants' Motions for Summary Judgment.

9. During the middle of September 1963, Guy Scola, Assistant to the Secretary, requested that I ascertain the number of members of the Federation who are members of two Locals; three Locals; four Locals, etc. Through the use of the multiple membership file of the Federation, I have ascertained that there are 12,381 individuals who are members of more than one Local, and that there are 26,174 duplicate memberships made up as follows:

Individual Members	Number of Different Locals to Which Individual Members Belong	Duplicate Memberships
11,145	2	22,290
1,074	3	3,222
152	4	608
6	5	30
4	6	24
TOTALS: 12,381		26,174

Thus, 12,381 members of the Federation are members of more than one Local.

ERNEST NERI

(Sworn to September 30, 1963.)

(Exhibit omitted)

Affidavit of Guy Scola, Sworn to October 1, 1963, Read in Support of Defendants' Motions for Summary Judgment

(Wittstein R. 270-72)

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE.]

STATE OF NEW YORK }
COUNTY OF NEW YORK } ss.:

GUY SCOLA, being duly sworn, deposes and says:

1. I am, and since 1959 have been, Assistant Secretary of the American Federation of Musicians of the United States and Canada (the "Federation"). I make this affidavit as a supplement to my affidavit sworn to September 18, 1963, previously submitted in this action.

2. There are various individuals who belong to more than one Local of the Federation. These individuals pay an initiation fee and dues to each Local to which they belong; are entitled to vote for the officers of the Locals to which they belong; and are entitled to all of the benefits and privileges of each such Local. In addition, the Locals to which they belong, in turn, pay per capita dues based upon all of their members, including those belonging to more than one Local.

3. I assisted in the preparation of the Secretary's Report contained in the Official Proceedings of the 66th Annual Convention of the American Federation of Musicians of the United States and Canada. In that report, the following statement is made:

> "Our membership has increased 4,546 since last year. We now have 281,949 members (26,000 of which are duplications since they belong to more

Affidavit of Guy Scola, Sworn to October 1, 1963, Read in Support of Defendants' Motions for Summary Judgment.

than one local). 6,628 members are in the Armed Forces of the United States and Canada" (p. 125).

4. During the middle of September 1963, pursuant to a request of counsel, I directed Ernest Neri, Supervisor of the I.B.M. Department, to prepare a report showing the number of persons who belong to more than one Local of the Federation. Mr. Neri has informed me that the result of his report shows that there are 12,381 individuals who are members of more than one Local, and that there are 26,174 duplicate memberships made up as follows:

	Individual Members	Number of Different Locals to Which Individual Members Belong	Duplicate Memberships
	11,145	2	22,290
	1,074	3	3,222
	152	4	608
	6	5	30
	4	6	24
TOTALS:	12,381		26,174

Thus, 12,381 members of the Federation are members of more than one Local.

GUY SCOLA

(Sworn to October 1, 1963.)

Affidavit of George Meany, Sworn to October 8, 1963, Read in Support of Defendants' Motions for Summary Judgment

(Wittstein R. 247-50)

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE.]

DISTRICT OF COLUMBIA) ss.:

GEORGE MEANY, being duly sworn, deposes and says:

1. I am President of the American Federation of Labor and Congress of Industrial Organizations and have held this office since the establishment of the AFL-CIO in 1955. Previously I had been Secretary of the American Federation of Labor from 1940 to 1952 when I became President of the American Federation of Labor.

2. The AFL-CIO has been vitally interested in promoting democracy in its constituent unions. In my capacity as President of the AFL-CIO and in my previous positions I have become familiar with the constitutions and practices of a very large number of international labor organizations.

3. I am informed that there is being litigated in the instant action the question as to whether weighted voting by delegates in accordance with the provisions of Article 5 of the Constitution of defendant American Federation of Musicians of the United States and Canada is legal in view of the provisions of Sections 101 (a)(1) and 101 (a)(3)(B) of the Landrum-Griffin Act.

4. I know of my own knowledge that a large number of international labor organizations provide in their constitutions or by-laws that voting at conventions of the international union shall be by delegates weighted according to the number of members of the locals. In most other interna-

tional unions the number of delegates which a local may send to a convention is based on the number of members in the local. In many of those international unions locals which are entitled to more than one delegate at the convention may send a single delegate to the convention to cast the votes of all the delegates which the local is allowed. Those international unions find such provisions necessary because it would be too expensive for some locals to send the full number of delegates permitted yet it is undemocratic and undesirable to reduce a local's representation because of inability to pay for a whole delegation. Indeed, many international unions provide that locals may jointly send a single delegate to vote the strength of all of them, in order to minimize their expenses.

5. In my official capacity as President of the AFL-CIO I testified before the Joint Subcommittee of the House Committee on Education and Labor on Labor-Management Reform Legislation, which was considering proposed legislation which culminated in the enactment of the Labor-Management Reporting and Disclosure Act of 1959. With respect to the provision in the bill which had passed the Senate relating to the methods by which unions could raise dues and assessments, I testified as follows:

> "If we are correct in this assumption as to what the Senate intended, section 101 (a) (3) actually permits changes in dues and assessments by every method which unions generally employ except action by a general executive board or similar body. There is absolutely no reason why an international union should not have the power, by its convention or by convention action, to delegate to its executive board the authority to impose assessments in cases of financial urgency without the necessity of going to the expense of calling a special convention or conduct-

Affidavit of George Meany, Sworn to October 8, 1963, Read in Support of Defendants' Motions for Summary Judgment.

ing a national referendum." Hearings Before a Joint Subcommittee of the House Committee on Education and Labor on Labor-Management Reform Legislation, 1482, 1518 (1959).

At no time before or after my statement did any congressman dispute my statement that the proposed legislation "actually permits changes in dues and assessments by every method which unions generally employ except action by a general executive board or similar body". The House in response to this criticism altered the Senate bill to provide a means by which a general executive board could raise dues and assessments.

6. A convention of an international union is a representative body. The delegates of such a convention represent the members of the locals who elect them to serve as delegates. Members elect their delegates by secret ballot in order that the delegates may effectively represent them at conventions. The weighted roll call vote provided for in Article 5 of Federation's Constitution and in a large number of other international labor union constitutions clearly furthers intraunion democracy. A system whereby the votes of delegates are weighted by the number of members they represent is a most democratic one.

7. In my opinion a determination holding that the provision for weighted voting contained in Article 5 of the Federation's Constitution is invalid would be disastrous to a substantial number of international labor unions whose constitutional procedures would thereby be invalidated and would violate democratic principles.

GEORGE MEANY.

(Sworn to October 8, 1963.)

Affidavit of Guy Scola, Sworn to October 9, 1963, Read in Support of Defendants' Motions for Summary Judgment

(Wittstein R. 251-64)

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE.]

STATE OF NEW JERSEY }
COUNTY OF ESSEX } ss.:

GUY SCOLA, being duly sworn, deposes and says:

1. I am Assistant Secretary of the American Federation of Musicians of the United States and Canada ("Federation"). This affidavit supplements affidavits previously submitted by me in this proceeding.

2. I have listened to the tape recording of the proceedings of the Convention and have read the annexed transcript of the proceedings relating to Recommendation No. 11, which took place on the evening of June 12, 1963 (Exhibit A). That transcript contains a full and accurate account of all of the statements made by and addressed to the Chairman, regarding the request for a roll call vote, the instructions relating to the mechanics of voting by a roll call vote, and the splitting of votes.

3. As will be noted from the transcript, no question was raised by any delegate with regard to the request made in behalf of five locals of the Federation for a roll call vote; the propriety of a roll call vote; or as to the propriety of splitting votes.

4. I am familiar with the practices of locals of the Federation relating to the election of delegates to the Convention. Every delegate to the Convention is elected by secret ballot.

5. I have tabulated the vote on Recommendation No. 11 upon the basis set forth in Article 5 of the Federation's

Extracts from tape of Wednesday night session, June 12, 1963, of the 1963 AFM Convention.

Constitution (viz., each local shall be entitled to one vote for each one hundred members or major fraction thereof, but no local shall cast more than ten votes) where there is no roll call vote.

The result of my tabulation is as follows: 1,044½ votes in favor of Recommendation No. 11, and 829½ opposed to Recommendation No. 11. There were 25 locals with a total number of 30 votes which were either absent or which abstained from voting at the time the roll call vote took place at the evening session on June 12, 1963.

GUY SCOLA

(Sworn to October 9, 1963.)

Extracts from tape of Wednesday night session, June 12, 1963, of the 1963 AFM Convention

(Exhibit A, Annexed to the foregoing Affidavit of Guy Scola)

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE.]

Tuesday, October 8, 1963
American Federation of
Musicians
220 Mount Pleasant Avenue
Newark, New Jersey
9:30 o'clock a.m.

Delegate: Mr. Chairman, I rise on a point of procedure. I can't tell whether the vote is yes or no so I feel as though the question I asked is still in good taste.

Extracts from tape of Wednesday night session, June 12, 1963, of the 1963 AFM Convention.

We are discussing the recommendation which is a pot pourri of several resolutions which have been introduced to the convention; in the event that this resolution would be voted down by the delegation here tonight, would this not mean that the convention's position of considering each resolution is to be left separate and does this have the point of defeating all of these resolutions?

Davis: The judgment of the joint committee members in answer to the query is that if this recommendation of the committee is defeated then we will start from scratch and consider each resolution separately or combine some or in any event we will have to start from scratch if this recommendation is defeated.

Kenin: Microphone 3. Bert—who recognizes——

Delegate: Mr. Chairman, it seems to me—Microphone 3. Mr. Chairman, it seems to me that a matter of such great importance as this to be placed in a voice vote is ridiculous because it's going to be a matter of who outyells who. I think we should set the machinery in motion tonight or tomorrow morning for a ballot vote. This will give us the only real decision.

Kenin: Well, a roll call vote is what you are referring to. Any ten delegates or five locals may ask for a roll call vote if you are dissatisfied with the voice vote.

Microphone Number—Merle Snider.

Snider: Merle Snider, Local 368, Reno, Nevada. I call for a roll call vote.

I have Local 269, Harrisburg, Pennsylvania. Local 368, Reno, Nevada. Local 47, Los Angeles. Local 20, Pittsburgh. Local 369, Las Vegas.

Kenin: You mean Local 20, Denver.

Snider: I'm sorry. Pittsburgh. Local 6, San Francisco. And next to that—I have five locals which is required by the Constitution to ask for a roll call vote. This will be verified by the Chair.

Kenin: Yes. The gentleman has stated, Merle Snider has stated to the Chair, he has named the cities; the locals

Extracts from tape of Wednesday night session, June 12, 1963, of the 1963 AFM Convention.

who are here have agreed, evidently. I hear no objections to it.

The roll call vote has been asked for. It's mandatory under the law. Now, we haven't had a roll call vote. I don't recall when we had the last one but we will have it on the basis of local numbers— One starting right down through the list, and somebody speaking for the local and give the chair the—the vote of that particular local.

Kenin: Microphone 5, Tomei.

Tomei: Mr. Chairman, I'd like to ask two questions. One is that in the event that the delegates of the local are divided on the question what happens in that case? Would one man vote?

Kenin: I'm advised, Brother Tomei, that on a split vote each would vote the number of the divisional. You understand, delegates, when you vote in a roll call vote you vote the total membership of your local. You have to divide up the membership of your local.

Tomei: The other question, Mr. Chairman,—Mr. Chairman, the other question is will you please explain to the convention what a roll call vote is?

Kenin: Yes. Yes, sir. A roll call vote, ladies and gentlemen, is a vote of the total membership of a local. For example, the first local would be Number 1. Local number—the local One representative would rise to the microphone and say, "Cincinnati votes as follows." That would be recorded here. We go through the entire list of locals. That's the only way we can do it and we are required to do it under the law.

Now, the secretary will conduct the balloting.

We'll take a moment or two because this is a surprise to us. We have no machine here for it. An adding machine has been brought to the stage. The mechanics are being arranged.

Davis: Mr. Chairman, ladies and gentlemen of the Committee—of the Convention—, may I have your attention,

Extracts from tape of Wednesday night session, June 12, 1963, of the 1963 AFM Convention.

please? While we wait for the mechanics of the roll call vote to be set up I would like to make a Committee announcement.

The Law Committee will meet at nine o'clock tomorrow morning in the Pasteur Room. Will the proponents of Resolution 31 please be available at 9:05 A. M.

The proponents of Resolution Number 30 at 9:20 A. M., and the proponents of Resolution Number 15 at 9:35 A. M.

You will please observe that we will meet at 9:00 o'clock tomorrow morning in the Pasteur, and will the proponents of the three resolutions called please make themselves available.

Thank you.

Jaffe: Mr. Chairman, may I request that this convention recess for a period of ten minutes?

(Shouts of "No")

Mr. Chairman——

Kenin: There doesn't seem to be much enthusiasm for your suggestion.

Jaffe: Mr. Chairman. Hy Jaffe. I represent—I'm Hy Jaffe. I represent also Local 802.

With sudden haste the question is called and this convention was given just one alternative, either accept the report of the committee in its entirety or reject the report of the committee in its entirety.

If you reject the report of this committee in its entirety you are inflicting a grievous injury upon the American Federation of Musicians. If, however, you——

(Shouts: "Out of Order")

—Wait a moment, please. If, however, you voted—you vote for it—in my mind I don't think you are doing the job completely either. This thing was suddenly brought to a vote. I personally would like to examine some of the figures and discuss them with you.

Extracts from tape of Wednesday night session, June 12, 1963, of the 1963 AFM Convention.

There is 28,000 votes which we are charged with, a little over 28,000; and I personally think to the best interests of my representing the people in Local 802 as well as discharging my duty here at the convention that I be permitted to make a speech.

(Shouts: No. No.)

Kenin: Brother, Brother. We have been here since eight and all the delegates have been patient with the speakers and I have tried to let everyone speak who I can find at a microphone. The question was asked and the question was put before you. It was voted. A roll call was asked for in legal form. I have a duty to place the matter before you on a roll call basis.

Jaffe: Point of information. Point of information. Point of information. Are these votes to be determined by the figures that you see on your roster or is it the current figures as of June 13th—12th, 1963.

Kenin: The roll call is on the basis of those figures here in the roll call as of Monday—as of Monday as was printed here (unintelligible).

Jaffe: I asked my secretary when he turned those figures in here, I think. (unintelligible portion). However, we have something like forty more reported on that particular deal.

Kenin: We cannot, brother—(unintelligible)—on the basis of that information. There is nothing to check with you about that. (unintelligible)

Voice: Will you explain that thing?

Kenin: Well, I'll do the best I can, Brother. If a Local has a thousand members and if one person speaks for that local, having assured this delegation that this (unintelligible words)--he stands up and votes. He names that (unintelligible word) local and the number.

Wood: I feel that this is possibly the most important decision.

Extracts from tape of Wednesday night session, June 12, 1963, of the 1963 AFM Convention.

Kenin: Pardon me. Pardon me. I must get their attention.

Wood: Alan Wood.

Kenin: Delegates, Brother Wood, President of the Toronto Local has asked for your attention. Will you please give it to him.

Wood: Mr. Chairman, Members of the Executive Board and Delegates: I think that this is possibly (unintelligible words) decision that the members of the American (unintelligible words) Musicians will have to make. It may be out of order to discuss a roll call vote but I suggest to you, sir, it's ten after twelve and I also suggest that the delegates here have been here for some four hours plus this afternoon's session, plus this morning's session and I suggest the emotional strain—we are all musicians in heart and we all are emotionally affected. I ask, sir, for the roll call vote in the morning at a designated time from the Chair.

(Shouts of "No".)

Kenin: Brother Wood, many of these delegates have plans which they have made weeks in advance. We're trying to move this thing along and you have heard an expression just on the basis of your comment that there is dissatisfaction. I think it's our duty to go through with it. I think that if you wish——

(Applause and four individual shouts of "No")

Microphone 3——

Tomei: Will these votes be recorded as they are made?

(Voice): Yes, they are recorded.

Tomei: As they're made. Those for and against, from each (unintelligible word) local if it's a local that's a divided local.

Kenin: Brother Ballard will conduct the vote and he will give you instructions as to how you may appear at a particular microphone, just to help us to keep the count up here.

Extracts from tape of Wednesday night session, June 12, 1963, of the 1963 AFM Convention.

Ballard: May I have your attention, please? We are about ready to begin the roll call. Please let me have your attention. Delegates have come to the stand (unintelligible). I called the persons' names two or three times. The roll call vote allows the local to vote the membership of the entire local—the membership upon which they pay per capita (unintelligible words). That means that Local Number 1 will vote 1,115 votes and so on down through the entire list.

I'm going to read these local numbers very slowly at least until we can find a way and find out if I can speed it up. I'm going to read it slowly for the purpose that if there is a split vote in any delegation I want to give the other speaker an opportunity to vote the votes he represents in that particular local.

If there are three votes in a local and they have 1500 members and they are split, two of them vote one way and one vote the other; You have two voting 1000 votes one way, and one voting 500 votes the other way. You split your entire delegation, vote just according to the way your delegates representing your local want to vote your votes.

Now, I—I want to warn the delegates the only thing you are entitled to here is to vote. Speak up to the microphone and that's so the tellers can tell which way you are voting. State your local number, city and the way you are voting; either yes, in favor of Recommendation Number 11 or no, in opposition to Number 11. State your Local number, your city and the way you are voting, either yes or no. No exceptions will be permitted because if we start making speeches in connection with 1800 different (unintelligible word), 680 different locals voting, we will be here all night so please confine your remarks solely to yes and no.

Now, will the electrician advise us whether he has turned on the microphones so the delegates may announce their vote over a microphone?

(End of matter transcribed)

Extracts from tape of Wednesday night session, June 12, 1963, of the 1963 AFM Convention.

STATE OF NEW JERSEY
COUNTY OF ESSEX } ss.: CERTIFICATE

I, GERTRUDE WACHTEL, being duly sworn, deposes and says:

(1) I am a shorthand reporter associated with Paul Fromm, CSR, Official Reporter in the New York area for the Federal Trade Commission.

(2) I have acted as shorthand reporter at the National Labor Relations Board.

(3) I heard a tape recording of the proceedings of the convention of the American Federation of Musicians and made complete and accurate notes thereof. These notes were transcribed by me.

(4) The foregoing contains a full and accurate transcript of the tape recording I listened to.

(5) I am in no way interested in the outcome of the litigation involved herein.

(6) I am neither of counsel nor related to any of the parties involved in said litigation.

GERTRUDE WACHTEL

Sworn to and subscribed before me this 8th day of October, 1963.

KATHLEEN E. BOLE
NOTARY PUBLIC OF NEW JERSEY

My Commission expires Apr. 23, 1967

(NOTARIAL SEAL)

Opinion, Findings of Fact and Conclusions of Law
No. 29,321.

(Wittstein R. 438-56)

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

EDDIE WITTSTEIN, BEN CUTLER, JULIUS SCHWARTZ, MARTY LEVITT, CLAUDE GARREAU, BERT FISHER, GEORGE AULD, LEO GRECO, HECTOR DE RIENZO, MILTON FABOWITZ and MATT GILLESPIE,

Plaintiffs,

against

AMERICAN FEDERATION OF MUSICIANS OF THE UNITED STATES AND CANADA,

Defendant.

63 Civ. 2548

Opinion

JULIUS SCHWARTZ, BUDDY KANE, ROBERT CURTIS, JOHN C. ROSENMERKEL, WILLIAM ARNOLD, FRANCES BARON, LEONARD O. GASKIN, LOUIS V. SCHWARTZ, HERBERT WASSERMAN, JUDITH BREGMAN, SOLOMON KOSARIN and GLEN WILLIAMS,

Plaintiffs,

against

63 Civ. 2442

ASSOCIATED MUSICIANS OF GREATER NEW YORK, LOCAL 802, AMERICAN FEDERATION OF MUSICIANS OF THE UNITED STATES AND CANADA,

Defendants.

Appearances:

GODFREY P. SCHMIDT
Attorney for Plaintiffs
60 East 42 Street
New York, N. Y.

Opinion.

McGoldrick, Dannett, Horowitz & Golub
Attorneys for Defendant American Federation of Musicians of the United States and Canada
3 East 54 Street
New York, N. Y.

Emanuel Dannett,
Herbert D. Schwartzman,
Eugene Mittleman,
Of Counsel.

Ashe & Rifkin
Attorneys for Defendant Associated Musicians of Greater New York, Local 802
305 Broadway
New York, N. Y.

David I. Ashe,
Of Counsel.

Levet, D. J.

These consolidated actions are brought by members of the defendant unions challenging certain recent fiscal enactments of both the parent Federation and its Local 802. The complaint in *Wittstein* challenges the procedure at the Federation's recent annual convention by which a resolution was enacted, purporting to abolish the so-called 10% traveling surcharge tax and substituting therefor an increase in the per capita dues of members of the Federation. The complaint in *Schwartz* is framed in two counts, the second of which is substantially identical to the cause of action asserted in the *Wittstein* complaint. This opinion is expressly directed to govern the disposition of the *Wittstein* complaint and the second count of the *Schwartz* complaint. The first count in *Schwartz* challenges a provision of Local 802's By-Laws which, for the present purposes, is sufficiently unrelated to the cause asserted in the *Wittstein* complaint to be the subject of a separate opinion.

Opinion.

The complaints challenge the procedure by which the resolution was adopted as violative of both the Labor-Management Reporting and Disclosure Act of 1959, 73 Stat. 522, 29 USC §401 *et seq.*, and the defendant Federation's own Constitution and By-Laws. A declaratory judgment is sought seeking to enjoin the defendant Federation from carrying into effect the resolution on its effective date of January 1, 1964. The Federation has moved for summary judgment.

In order to place the action of the convention in its proper reference, it is necessary to briefly review the legal history of the Federation's 10% traveling surcharge. Article 15 of the Federation's By-Laws requires that Federation members who perform a "miscellaneous out-of-town engagement" be paid, but not to actually receive, an amount equal to 10% of the minimum wage established by the local in whose jurisdiction the engagement takes place. This additional amount is known as the "traveling surcharge." The orchestra leader does not actually turn over the additional 10% to his musicians (sidemen) because Federation By-Laws provide that the local in whose jurisdiction such engagement is performed must collect the traveling surcharge from the orchestra leader and transmit the amount to the Federation. Should the Local fail to collect the surcharge from the leader, the leader is required to transmit the surcharge directly to the Federation. In a prior action brought by the plaintiff Cutler, the collection of the 10% traveling surcharge from Cutler, when engaged as an employer in the single engagement field, was held to be violative of Section 302 of the Taft-Hartley Act, 29 USC §186. *Cutler* v. *American Fed. of Musicians*, 211 F. Supp. 433 (S. D. N. Y. 1962), aff'd 316 F. 2d 546 (2 Cir. 1963), petition for certiorari filed, 32 U. S. L. Week 3103 (U. S. Sept. 16, 1963) (No. 473). At the convention, the officers of the Federation sought to abolish the 10% traveling surcharge and substitute therefor an increase in the per capita dues of its 282,000 members.

STATUTES INVOLVED

The pertinent portion of the Act involved is as follows:

"SUBCHAPTER II.—BILL OF RIGHTS OF MEMBERS OF LABOR ORGANIZATIONS

"§411. Bill of rights; constitution and bylaws of labor organizations

"• • •

"(3) Dues, initiation fees, and assessments.—Except in the case of a federation of national or international labor organizations, the rates of dues and initiation fees payable by members of any labor organization in effect on September 14, 1959 shall not be increased, and no general or special assessment shall be levied upon such members, except—

"• • •

"(B) in the case of a labor organization, other than a local labor organization or a federation of national or international labor organizations (i) by majority vote of the delegates voting at a regular convention, or at a special convention of such labor organization held upon not less than thirty days' written notice to the principal office of each local or constituent labor organization entitled to such notice, or (ii) by majority vote of the members in good standing of such labor organization voting in a membership referendum conducted by secret ballot, or (iii) by majority vote of the members of the executive board or similar governing body of such labor organization, pursuant to express authority contained in the constitution and bylaws of such labor organization: *Provided*, That such action on the part of the executive board or similar governing body shall be effective only until the next regular convention of such labor organization."

Opinion.

The defendant Federation is conceded to be a labor organization in an industry affecting commerce as defined in 29 USC § 402(i) and is a labor organization other than a local labor organization or a federation of national or international labor organizations within the meaning of 29 USC § 411(a)(3)(B). See *Cutler* v. *American Fed. of Musicians, supra.*

The relevant article of Federation's Constitution is Article 5 and of the Federation's By-Laws, Article 28. Article 5 is as follows:

"ARTICLE 5—REPRESENTATION AND DELEGATES

"All Locals of this Federation of one hundred and fifth members or less shall be entitled to one delegate. All Locals shall be entitled to one delegate for each one hundred members or a major fraction thereof, not exceeding three delegates for any one Local, but each Local shall be entitled to one vote for each one hundred or major fraction thereof, but no Local shall cast more than ten votes, and the number each Local is entitled to shall be computed from the last report made on January 1st before the convention by the Local, according to the books of the Treasurer. On questions affecting a change in the laws, each Local may, upon roll call, cast as many votes as it has members, as per book of the Treasurer, A. F. of M. All laws so passed shall be referred to a convention committee consisting of the Executive Board, A. F. of M., and chairmen of all committees, who may sanction or veto same, their action to be final. Roll call shall be demandable and had under this Article on demand of ten delegates or five Locals."

Article 28 of Federation's By-Laws in the pertinent parts are as follows:

Opinion.

"ARTICLE 28 — CONVENTION PROCEEDINGS — THE ORDER OF BUSINESS SHALL BE:

"SECTION 1. Appointment of Credentials Committee by the President.
Report of Committee on Credentials.
Standing introduction of Delegates attending Convention for the first time.
Appointment of other committees.
Reading of rough minutes of previous session.
Report of officers.
Communications and bills.
Reports of committees.
Unfinished business.
New business.
Nomination and election of officers.
Installation of officers.
Reading of rough minutes.
Adjournment.

"SECTION 2. For Rules of Order, Robert's Revised Manual shall be the guide unless otherwise provided and the manner of voting shall be *viva voce*, unless otherwise ordered. The vote at elections or the vote on roll call shall be in accordance with Article V of the Constitution.

"SECTION 3. The recommendations made in the official report of the President, Secretary or Treasurer relative to any new law or to any advisable changes in existing laws shall be immediately referred to the Law Committee and shall not thereafter be considered in connection with the report of such officer.

"SECTION 4. Delegates or Locals desiring to introduce in the Convention any resolution or measure must forward same written and in duplicate to the International Secretary, not later than fifteen (15)

days before the day set for the first session of the Convention.

"A. All such resolutions or measures shall be printed and distributed to the delegates at said first session.

"B. In addition, delegates may introduce resolutions until thirty (30) minutes after the closing morning session of the second day of the Convention by presenting same to the Chairman.

"C. All resolutions or measures shall be numbered consecutively and printed in compact pamphlet form.

"SECTION 5. At the annual Convention the President shall appoint the following committees: Finance, Measures and Benefits, Good and Welfare, Organization and Legislation, International Musician, President's Report, Secretary's Report, Location and such other committees as the Convention may direct. As soon as practicable after receiving the list of delegates, the President shall appoint from that list the Credentials Committee and the Law Committee, and from the members of said Law Committee a subcommittee of five to be known as the Appeals Committee.

"SECTION 6. • • •

"SECTION 7. The Committee on Credentials shall examine and report on the credentials of delegates. The chairman of the committee shall take charge of all documents appertaining to the duties of said committee, investigate and report upon the credentials of the delegates immediately after appointment, and the report of said committee shall be disposed of before any other business is transacted.

Opinion.

"A. When the Secretary receives credentials from the locals he shall, when acknowledging receipt of the same to the individual delegates, enclose a sticker which the delegate may attach to his luggage on which is inscribed words encouraging the use of live music.

"Section 8. The Committee on Finance shall annually inspect and investigate the financial affairs of the American Federation of Musicians and accounts of the Secretary and Treasurer of the Federation, as well as the books and accounts of all who may be entrusted with the receipt or expenditure of Federation funds, and shall make a full report in writing of its findings to the Convention of the Federation at which it was appointed.

"Section 9. All other committees created by the Convention shall perform such duties as indicated by their title, and all resolutions introduced shall be referred by the President to the Committee he deems appropriate to receive and act upon such resolution.

"Section 10. Printed copies of the annual reports of the President, Secretary, Treasurer, Auditor and any resolutions to be submitted to the Convention by the International Executive Board, if possible, shall be mailed to the accredited delegates to the Convention of the Federation not earlier than three weeks and not later than two weeks preceding the opening session of the Convention.

"Section 21. No alterations or amendments to the Constitution or By-Laws (except it is otherwise provided in the By-Laws or ordered by a Convention) shall be made unless proposed in writing, and said alterations or amendments must receive a majority

vote of the delegates present to become a law, unless otherwise provided.

"SECTION 22. All amendments and additions to the laws passed by the Federation shall go into effect the fifteenth day of September succeeding the Convention which enacts them. Exempt therefrom are amendments and additions for the enforcement of which the Convention has designated another date than the fifteenth day of September."

As appears in 29 USC § 411(a)(3), "the rates of dues and initiation fees payable by members of any labor organization in effect on September 14, 1959 shall not be increased, and no general or special assessment shall be levied upon such members except,—* * *" as provided by said Section 411(a)(3). These methods governing in the case of a labor organization such as defendant Federation are specifically set forth as follows:

"* * * (i) by majority vote of the delegates voting at a regular convention, or at a special convention of such labor organization held upon not less than thirty days' written notice to the principal office of each local or constituent labor organization entitled to such notice, or (ii) by majority vote of the members in good standing of such labor organization voting in a membership referendum conducted by secret ballot, or (iii) by majority vote of the members of the executive board or similar governing body of such labor organization, pursuant to express authority contained in the constitution and bylaws of such labor organization: *Provided*, That such action on the part of the executive board or similar governing body shall be effective only until the next regular convention of such labor organization."

THE CONVENTION'S VOTE

There are no genuine issues as to any material facts concerning the following: At an evening session of the convention commencing at 8:15 P.M. on June 12, 1963, the Joint Committee on Law and Finance submitted its report through Chairman Davis (Law) and Chairman Chanson (Finance) recommending passage of Recommendation No. 11 which *inter alia* abolished the 10% traveling surcharge and substituted therefor an increase in the per capita dues of Federation members. After some discussion and the transaction of other business, Recommendation No. 11 was called for vote. Two voice votes were had, after each of which the Chair was unable to determine whether the "ayes" or "nayes" predominated, stating: "The ayes and nayes appear to be of equal response." No further attempt was made to ascertain how the delegates voted either by a show of hands or by standing. Thereafter, Delegate Snider, alleging to be speaking in behalf of five locals, demanded a roll call vote in accordance with Article 5 of the Federation's Constitution, which provides:

> "On questions affecting a change in the laws, each Local may, upon roll call, cast as many votes as it has members as per book of the Treasurer, A. F. of M. • • • Roll call shall be demandable and had under this Article on demand of ten delegates or five Locals."

The Chair then stated: "• • • The roll call vote has been asked for. It's mandatory under the law. • • •" Delegate Tomei then inquired what procedure was to be followed if "the delegates of the local are divided on the question." The Chair responded:

> "I'm advised, Brother Tomei, that on a split vote each would vote the number of the divisional. You understand, delegates, when you vote in a roll call

vote you vote the total membership of your local. You have to divide up the membership of your local." (Scola aff. Oct. 9, 1963, Ex. A, p. 4)

In response to a request to explain what a roll call vote is, the Chair answered:

> "A roll call vote, ladies and gentlemen, is a vote of the total membership of a local. For example, the first local would be Number 1. Local number—the local One representative would rise to the microphone and say, 'Cincinnati votes as follows.' That would be recorded here. We go through the entire list of locals. That's the only way we can do it and we are required to do it under the law." (*ibid.*)

Again, prior to the vote, the Chair explained:

> "• • • If a Local has a thousand members and if one person speaks for that local, having assured this delegation that this (unintelligible words)—he stands up and votes. He names that (unintelligible word) local and the number." (Scola aff., id., p. 7)

Later, Secretary Ballard stated:

> "• • • The roll call vote allows the local to vote the membership of the entire local—the membership on which they pay per capita (unintelligible words). That means that Local Number 1 will vote 1,115 votes and so on down through the entire list." (Scola aff., id., p. 9)

The roll call vote was taken, which resulted in 158,068⅔ votes being cast in favor of Resolution No. 11, and 113,742⅓ votes in opposition. The Chair announced the vote and the session was adjourned at 2:30 A.M.

Opinion.

There are at least 12,381 members of the Federation who are members of more than one Local. They are classified as follows:

	Individual Members	Number of Different Locals to Which Members Belong	Duplicate Membership Voting Strength
	11,145	2	22,290
	1,074	3	3,222
	152	4	608
	6	5	30
	4	6	24
TOTALS	12,381		26,174

The defendant relies solely on the computed recorded vote as allocated to the respective Locals on a membership basis and on nothing else. (SM 119, Oct 1, 1963)

THE ISSUE

The issue, therefore, is whether or not the procedure in acting on this resolution increasing the dues complied with Section 101(a)(3)(B)(i) of the Act, 29 U. S. C. §411(a)-(3)(B)(i). There is, of course, no contention that a referendum was taken, subsection (a)(3)(B)(ii), nor is there any contention that the majority vote of the members of the Executive Committee was taken pursuant to express authority to increase dues contained in the Constitution and By-Laws of such labor organization, subsection (a)(3)(B)-(iii). The defendant contends that the vote as above mentioned and as set forth on pages 56-58 of the Official Proceedings complies with the statute (i.e., a passage "by a majority of the delegates voting at a regular convention"); the plaintiffs allege that it does not.

NON-COMPLIANCE WITH THE ACT

Purposes of the Act

One of the purposes of the Labor-Management Reporting and Disclosure Act of 1959 and particularly the so-called "Bill of Rights" (29 USC §§411-415) was "to insure union democracy." (Senate Report No. 187, 1959, U. S. Code Cong. & Ad. News, 2318) In the House Report No. 741 one of the purposes stated was to "Require democratic procedures and safeguards within unions, designed to protect basic rights of union members." (1959 U. S. Code Cong. & Ad. News, 2424) The Senate Report pointed out that effective measures to guarantee internal union democracy cannot be applied to all unions without the coercive powers of government (p. 2322); that "the financial conduct of labor unions and their officers is a proper concern of the Federal Government" and that the rules governing the conduct of the union's business such as dues and assessments payable by the members should be known to all members. (p. 2324) It is obvious that the "intended beneficiary of the Labor-Management Reporting and Disclosure Act of 1959 is the union member." (O'Donoghue, The Bill of Rights—Responsibilities of Its Beneficiaries, 48 Geo. L. J. 57 (1959))

Speaking of the above-mentioned House Committee Report No. 741, Freeman, District Judge, in *Horn* v. *Amalgamated Ass'n of Street Employees,* 194 F. Supp. 560, 561 (E. D. Mich. 1961) wrote:

> "This House Committee Report clearly shows that the reporting committee was concerned about instances of lack of 'internal union democracy' and proposed that effective measures for the protection of 'basic rights' could be applied only through powers of the Government. It is evident that the Bill of Rights of the Labor-Management Reporting and Dis-

closure Act of 1959 was the response of Congress to this concern in which the basic rights to be protected as *specifically* set out. • • •''

In an opinion concerning a resolution of a local union to increase dues, Van Dusen, D. J., wrote:

> "The purpose of the Labor-Management Reporting and Disclosure Act (29 U. S. C. A. §401ff.) is to assure that 'labor organizations, employers, and their officials adhere to the highest standards of responsibility and ethical conduct in administering the affairs of their organizations, particularly as they affect labor-management relations.' 29 U. S. C. A. §402(a). • • •'' Brooks *v.* Local 30, United Slate Workers, 187 F. Supp. 365, 367 (E. D. Pa. 1960).

In *Nelson* v. *Johnson*, 212 F. Supp. 233, 248 (D. Minn. 1962), particularly involving the fiduciary duties of union officials, Larson, District Judge, in commenting on the purposes of the Act, among other things said:

> "• • • There can, in short, be little doubt that Congress meant to lay its hands upon irregular internal affairs. See e.g., 105 Cong. Rec. 5489 (daily ed. April 16, 1959) (remarks of Senator Ervin); 45 Va. L. Rev. 203-206 (1959) (remarks of Senator Kennedy); see generally Cox, Internal Affairs of Labor Unions Under the Labor Reform Act of 1959, 58 Mich. L. Rev. 819 (1960). • • •''

The Congressional declaration of findings, purposes and policy contained in Title 29 USC §401 indicates the intent of Congress to require labor organizations and their officials to adhere to the highest standards of responsibility and ethical conduct in administering the affairs of their organization. To assist in the effectuation of this

purpose, Congress was not content to pronounce general platitudes but, instead, at least as to increased dues, provided explicit and exclusive methods by which such increases might be authorized. Defendant Federation claims that it produced an equivalent or even a superior or more democratic method, but that, even if true, is not determinative of the validity of the process observed.

In like fashion counsel may well argue that a national direct primary of all party voters might be a more democratic method of selecting a Presidential nominee that the convention method and that a direct poll of all voters would be a more democratic method of Presidential election than the present electoral college system. However, it is not the prescribed method and I believe that there is no doctrine of "equivalents" applicable here. As far as democracy is concerned, the second method, that is, membership referendum by secret ballot, is obviously more democratic than the process actually used.

Although proponents of the bill and others recognized the desirability of minimum interference by government in the internal affairs of the union, the fact is that a number of the provisions of the "Bill of Rights" are "express statutory restrictions and requirements which supersede and invalidate all existing contrary provisions in union-governing laws and must be applied to the form prescribed by the law whether or not a majority of the union membership so desires." Hickey, The Bill of Rights of Union Members, 48 Geo. L. J. 226 (1959). As Mr. Hickey points out, "[b]oth the Senate and the House furthered the intrusion of internal union affairs by incorporating the bill-of-rights provision" (id. at 230) and the third method of increasing dues (Title 29 USC §411(a)(3)(B)(iii)) was inserted by way of amendment to eliminate the necessity of the other more expensive requirements of special conventions and national referenda. (id. at 242)

Title 29 USC §411(b) provides: "Any provision of the constitution and by laws of any labor organization which

is inconsistent with the provisions of this section shall be of no force and effect." "When one becomes a union member, he agrees to be governed by the union constitution, by-laws, and rules *not inconsistent with rights and procedures established by the Act.*" (Emphasis inserted) *Cleveland Orchestra Comm.* v. *Cleveland Fed. of Musicians*, 303 F. 2d 229, 230 (6 Cir. 1962)

The pertinent provision of the Act requiring "a majority vote of the delegates voting at a regular convention" is clearly mandatory. The Act definitely limits the manner of action by stating that the rate of dues and initiation fees, etc. shall not be increased *except* by the methods specified.

As enunciated by La Buy, District Judge:

> "* * * A statute which directs performance of a certain thing in a particular manner, bears the implication that the action taken shall not be carried out otherwise than as directed nor by a different person. As was said in Botany Worsted Mills *v.* United States, 278 U. S. 282, 289, 49 S. Ct. 129, 132, 73 L. Ed. 379: 'When a statute limits a thing to be done in a particular mode, it includes the negative of any other mode. Raleigh, etc., R.R. Co. *v.* Reid, 13 Wall. 269, 270, 20 L. Ed. 570; Scott *v.* Ford, 52 Or. 288, 296, 97 P. 99.'" Toledo, P. & W. R.R. *v.* Stover, 60 F. Supp. 587, 593 (S. D. Ill. 1945)

In construing the Act, the court should first look to a plain-meaning of words as they have been actually enacted by Congress. *Hughes* v. *Local 11, International Ass'n of Bridge Workers*, 287 F. 2d 810, 818 (3 Cir.), cert. denied 368 U. S. 829 (1961).

Ranes v. *Office Employees Union*, 317 F. 2d 915 (7 Cir. 1963) has no bearing on the issue here. It held merely that a valid passage by an international union of a resolution increasing the dues of all members (i.e., including those of

all Local members) did not require action by the Local union under Section 101(a)(3)(A) of the Act, 29 USCA §411(a)(3)(A).

It is my conclusion that the convention failed to comply with the mandatory provisions of Title 29 USC §411(a)(3)(B)(i) and that as a result I am forced to declare the action taken increasing dues to be void. Consequently, there is no necessity of determining the alleged violations of the Constitution or By-Laws of the Federation. It is thus evident that the motion of defendants for summary judgment must be denied.

Although the plaintiffs made no cross-motion for summary judgment, the court has authority to grant summary judgment for plaintiffs. *Local 33, Int. Hod Carriers* v. *Mason Tenders Council*, 291 F. 2d 496 (2 Cir. 1961); *Bell* v. *Waterfront Commission of New York*, 183 F. Supp. 175 (S. D. N. Y. 1960), aff'd 279 F. 2d 853 (2 Cir. 1960); *Dickhoff* v. *Shaughnessy*, 142 F. Supp. 535 (S. D. N. Y. 1956); *Hennessey* v. *Federal Security Administrator*, 88 F. Supp. 664 (D. Conn. 1949); 6 Moore, Federal Practice ¶56.12 (2 ed. 1953).

Consequently, summary judgment for plaintiffs is granted to the following extent:

(1) A declaratory judgment declaring that that portion of Recommendation No. 11 increasing the per capita dues of Federation members was invalidly enacted under 29 USC §411(a)(3)(B)(i);

(2) The defendants Federation and Local 802 are permanently enjoined from carrying into effect the provisions of Recommendation No. 11 increasing the per capita dues of Federation members.

The first count in *Schwartz* challenges a provision of Local 802's By-Laws which, for the present purposes, as heretofore stated, is sufficiently unrelated to the cause asserted in the complaint herein to permit the entry of final

judgment with respect to the *Wittstein* action and the second count in the *Schwartz* action. Accordingly, I expressly direct the entry of a final decree and judgment with respect to *Wittstein* complaint and the second cause of action in *Schwartz*. There is no just reason for delay. All the facts pertinent to the decision on the Federation's actions have been adduced. There is, accordingly, no just reason why final judgment should not be entered. See Fed. R. Civ. P. 54(b); *Backus Plywood Corp.* v. *Commercial Decal, Inc.*, 317 F. 2d 339 (2 Cir. 1963), cert. denied, 32 U. S. L. Week 3153 (U. S. Oct. 22, 1963).

Settle order and judgment with costs against the Federation within ten (10) days from the date hereof on two (2) days notice.

Dated: New York, N. Y.
October 28, 1963.

RICHARD H. LEVET
United States District Judge

Judgment in 63 Civil 2442.

(Schwartz R. 480-81)

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

JULIUS SCHWARTZ, BUDDY KANE, ROBERT CURTIS, JOHN C. ROSENMERKEL, WILLIAM ARNOLD, FRANCES BARON, LEONARD O. GASKIN, LOUIS V. SCHWARTZ, HERBERT WASSERMAN, JUDITH BREGMAN, SOLOMON KOSARIN and GLEN WILLIAMS,

Plaintiffs,

against

ASSOCIATED MUSICIANS OF GREATER NEW YORK, LOCAL 802, AMERICAN FEDERATION OF MUSICIANS OF THE UNITED STATES AND CANADA,

Defendant.

63 Civil. Action 2442

This action having been consolidated for purposes of trial with the action entitled *Eddie Wittstein, et al.* v. *American Federation of Musicians of the United States and Canada* (63 Civil 2548), and defendant in each of the actions having moved for summary judgment in its favor,

Upon the complaint herein, the affidavits and exhibits submitted by defendant in support of its motion, dated September 23, 1963, for summary judgment in its favor in this action; the affidavits and exhibits submitted by the American Federation of Musicians of the United States and Canada in support of its motion for summary judgment in 63 Civil 2548; the affidavits and exhibits submitted by plaintiffs in opposition to each of the aforementioned motions; the Opinions, Findings of Fact and Conclusions of Law of this Court, dated and filed October 28 and October

30, 1963; and upon all the proceedings heretofore had herein and in 63 Civil 2548, it is hereby

ORDERED, ADJUDGED AND DECREED that the first claim for relief be and the same hereby is dismissed on the merits; and it is further

ORDERED, ADJUDGED, DECREED AND DECLARED that that portion of Recommendation No. 11 passed at the 1963 Annual Convention of the American Federation of Musicians of the United States and Canada, insofar as it increases the per capita dues of its members, was invalidly enacted under Section 101(a)(3)(B)(i) of the Labor-Management Reporting and Disclosure Act of 1959, 29 U. S. C. §411 (a)(3)(B)(i); and it is further

ORDERED, ADJUDGED AND DECREED that defendant is permanently enjoined from carrying into effect the provisions of the foregoing Recommendation No. 11 insofar as they increase the per capita dues of defendant's members; and it is further

ORDERED, ADJUDGED AND DECREED that defendant is entitled to costs in this action.

RICHARD H. LEVET,
United States District Judge.

Dated: New York, N. Y.
November 1, 1963.

Notice of Appeal in 63 Civil 2442.

(Schwartz R. 478)

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK.

[SAME TITLE.]

NOTICE IS HEREBY GIVEN, that Associated Musicians of Greater New York, Local 802, American Federation of Musicians of the United States and Canada, the defendant above-named, hereby appeals to the United States Court of Appeals for the Second Circuit from the judgment dated and entered in this action November 1, 1963, insofar as it grants summary judgment in favor of plaintiffs on the second claim for relief.

Dated: New York, N. Y.
November 1, 1963

ASHE & RIFKIN

By DAVID I. ASHE
Attorneys for Defendant
305 Broadway
New York 7, N. Y.
WO 2-3275

To:

GODFREY P. SCHMIDT, Esq.
Attorney for Plaintiffs
60 East 42 Street
New York 17, N. Y.
Mu 7-1950

Judgment in 63 Civil 2548

(Wittstein R. 341-42)

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

JULIUS SCHWARTZ, BUDDY KANE, ROBERT CURTIS, JOHN C. ROSENMERKEL, WILLIAM ARNOLD, FRANCES BARON, LEONARD O. GASKIN, LOUIS V. SCHWARTZ, HERBERT WASSERMAN, JUDITH BREGMAN, SOLOMON KOSARIN and GLEN WILLIAMS,

Plaintiffs,

against

ASSOCIATED MUSICIANS OF GREATER NEW YORK, LOCAL 802, AMERICAN FEDERATION OF MUSICIANS OF THE UNITED STATES AND CANADA,

Defendant.

63 Civil Action 2442

Upon the complaint herein, the affidavits and exhibits submitted by defendant in support of its motion dated September 23, 1963, for summary judgment in its favor; the affidavits and exhibits submitted by plaintiffs in opposition thereto; the Opinion, Findings of Fact and Conclusions of Law, dated and filed October 28, 1963; and upon all the proceedings heretofore had herein, it is hereby

ORDERED, ADJUDGED, DECREED AND DECLARED that that portion of Recommendation No. 11 passed at the 1963 Annual Convention of defendant, insofar as it increases the per capita dues of defendant's members, was invalidly enacted under Section 101(a)(3)(B)(i) of the Labor-Management Reporting and Disclosure Act of 1959, 29 U. S. C. §411(a)(3)(B)(i); and it is further

Judgment in 63 Civil 2548.

ORDERED, ADJUDGED AND DECREED that defendant is permanently enjoined from carrying into effect the provisions of the foregoing Recommendation No. 11 insofar as they increase the per capita dues of defendant's members; and it is further

ORDERED, ADJUDGED AND DECREED that plaintiffs are entitled to costs in this action.

Dated, New York, New York
October 30, 1963

RICHARD H. LEVET
United States District Judge

Notice of Appeal in 63 Civil 2548

(Wittstein R. 343)

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE.]

NOTICE IS HEREBY GIVEN, that American Federation of Musicians of the United States and Canada, the defendant above-named, hereby appeals to the United States Court of Appeals for the Second Circuit from the judgment, dated and entered in this action on October 30, 1963, and each and every part thereof.

Dated: New York, N. Y.
October 30, 1963.

McGOLDRICK, DANNETT, HOROWITZ & GOLUB

By EMANUEL DANNETT
A Member of the Firm
Attorneys for Defendant
3 East 54 Street
New York 22, New York

MU 8-7440

To:

GODFREY P. SCHMIDT, Esq.
Attorney for Plaintiffs
60 East 42 Street
New York 17, N. Y.

[fol. 145aa]

IN UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

63 Civil 2548

EDDIE WITTSTEIN, BEN CUTLER, JULIUS SCHWARTZ, MARTY LEVITT, CLAUDE GARREAU, BERT FISHER, GEORGE AULD, LEO GRECO, HECTOR DE RIENZO, MILTON FAROWITZ and MATT GILLESPIE, Plaintiffs-Appellees,

against

AMERICAN FEDERATION OF MUSICIANS OF THE UNITED STATES AND CANADA, Defendant-Appellants.

Appendix to Appellees' Brief—Filed November 20, 1963

[File endorsement omitted]

[fol. 146]

EXCERPTS FROM TESTIMONY—October 1, 1963

New York,
10.30 o'clock a.m.

Present:

Godfrey P. Schmidt, Esq., Attorney for Plaintiffs.

Ashe & Rifkin, Esqs., Attorneys for Defendant Local 802. By: Eugene Victor, Esq., of Counsel.

McGoldrick, Dannett, Horowitz & Golub, Attorneys for Defendants. By: Emanuel Dannett, Esq., Herbert D. Schwartzman, Esq. and Eugene Mittelman, Esq., of Counsel.

The Court: I would like to consider the Wittstein and Schwartz matters first. Is the affidavit here, Mr. Dannett?

Mr. Dannett: Yes, your Honor.

The Court: This is the affidavit of the supervisor of the IBM Department?

Mr. Dannett: I have two affidavits. One is by Mr. Guy Scola, who previously had submitted an affidavit, and then Mr. Neri, who is the supervisor of the IBM Department who actually made the survey which resulted in the figures which I quoted at least a portion of at the hearing held last week.

The Court: Have you a copy, Mr. Schmidt?

Mr. Schmidt: Yes, I have. It was just given to me.

The Court: Who is here, Mr. Scola?

Mr. Dannett: I have both Mr. Scola and Mr. Neri.

[fol. 147] The Court: Do you want to examine them?

Mr. Schmidt: Yes, I would like to.

The Court: Which one do you want first?

Mr. Schmidt: I will take Mr. Scola first.

The Court: Mr. Scola, will you come up here, please? The clerk will swear the witness.

Guy A. Scola, called as a witness, having been duly sworn, was examined and testified as follows:

By Mr. Schmidt:

Q. Mr. Scola, what is your position in the AFofM?

A. I am the assistant secretary.

Q. How long have you been assistant secretary?

A. Since 1959.

Q. Prior to that, were you a member of the AFofM?

A. Yes.

Q. In what capacity?

A. Prior to 1959, I was assistant to the secretary of the American Federation of Musicians.

Q. How long did you occupy that office?

A. Since 1952.

Q. How long were you a member of the AFofM all told?

A. Since 1943.

Q. Prior to 1952, did you occupy a position in AFofM or one of its locals?

A. Yes, one of its locals.

Q. Which local?

A. Local 77, Philadelphia.

Q. Since you have assumed the duties of your present office, have you attended all of the conventions, the annual conventions of the AFofM?

A. Yes.

Q. Did you attend the 66th Convention?

A. 1963, yes.

Q. Throughout its entire proceedings?

A. Yes, sir.

Q. When did you get down there?

A. June 1st.

• • • • • • •

Q. Mr. Scola, did you execute the affidavit which I am going to hand up to you?

A. Yes, I did.

[fol. 148] Q. That was the affidavit that you swore to on the 18th day—no, I beg your pardon—

The Court: The 1st day of October.

Mr. Dannett: 18th day of September, 1963.

Q. 18th day of September, 1963?

The Court: That is the original?

Mr. Schmidt: Yes.

Q. Did you personally write this affidavit, or did someone else dictate it?

A. I gave all the information in that affidavit.

Q. Did you dictate it, or did someone else dictate it?

A. Counsel prepared that for me.

Q. Counsel prepared it?

A. After I gave him the information.

Q. Did you give him the information to the effect that there were 26,000 members who had membership in two or more locals?

A. Repeat that question again, please? Did I what?

Q. Did you give him any information to the effect that there were 26,000 members of the AFofM who belonged to two or more locals?

A. Yes.

Q. And this is what you meant when you wrote paragraph numbered three of that affidavit?

A. That's right.

Q. Is it true that there were, as of the time that you wrote this affidavit, 26,000 members with two or more memberships in various locals?

A. That is 26,000 members in duplication.

Q. But you didn't say that, did you, Mr. Scola, in your affidavit?

A. I said what is there, that's right, sir.

Q. You said that approximately 26,000 members—26,000 are members of two or more locals; isn't that correct?

A. That's correct, sir.

Q. Is that a correct statement?

A. That is what I said.

Q. Is it a correct statement?

[fol. 149] Mr. Dannett: We concede the statement as set forth in there is not precisely accurate. It should have been dual membership. There are 26,000 dual membership.

Mr. Schmidt: I am not interested in any concession at this point.

Q. I want to know, Mr. Scola, whether your statement, the one I read to you, the one I am pointing out, approximately 26,000 are members of two or more locals—is that correct or not?

A. I gave that information, that is the way I gave it, to the extent that we had 26,000 duplications.

Q. That isn't my question. You didn't answer my question.

Mr. Dannett: I object to the question. The statement speaks for itself. The only question here, your Honor, is how many duplicate memberships are there?

The Court: Get at the facts rather than an attempt to draw conclusions from the statements in the affidavit.

Q. How many members are members of two or more locals in the AFofM?

A. Two or more locals of the AFofM—there are 26,000 duplications—I am sorry, Mr. Schmidt, I have to answer the way I should.

The Court: All right, he didn't say anything.

A. (Continuing) —of which I have jotted my own notes down, if I may refer to it—12,381 members—I am going to use the word "members" there—

Q. My question, Mr. Scola, was: How many members of the AFofM belong to two or more AFofM locals?

A. I guess it is that figure, 12,381, then.

Q. So that the statement that you have in this affidavit, approximately 26,000 are members of two or more locals, is not correct?

A. No. I mean the statement I made there is correct, sir, [fol. 150] but it has to be explained how that figure is.

The Court: Literally, it isn't so?

The Witness: O. K., Judge.

The Court: It is conceded, there isn't any question about it.

Q. Mr. Scola, what is the source of the statistics which you have put in your affidavit of October 1, 1963—and I show you a copy of it and point out the statistics?

A. The source of that is from our IBM Department.

Q. Did you personally get that material from the IBM Department?

A. Yes, I did.

Q. Did you compile it in this statistical form yourself?

A. The information I got from the IBM Department I relayed it on to our counsel, who drew it in affidavit form.

The Court: What you are trying to say is you relied upon someone from the IBM Department of the Federation to give you these figures, is that correct?

The Witness: That's correct, your Honor.

The Court: You didn't compute it?

The Witness: I didn't compute it myself; the information was given to me.

Q. What is the name of the gentleman in the IBM Department to whom you applied?

A. Ernest Neri.

Q. Would you mind telling us what you asked him to supply you with?

A. Yes. I asked him to supply us with, as soon as possible, the number of members who belonged to two, three, four, five and six locals.

Q. What did he say to you?

A. He said he would work on it immediately.

The Court: He said what?

The Witness: That he would work on it immediately, to compile the information requested.

[fol. 151] Q. And eventually he gave you some statistical material from which you copied this material in your affidavit of October 1st?

A. That's correct, sir.

Q. In what form are the original records reflecting this statistical material kept?

A. As far as I know—

Q. If you don't know, say you don't know yourself of your own knowledge.

A. Only what was told to me.

Q. I wanted only your own knowledge.

A. That is a different building altogether.

The Court: You don't know how they computed this, what factors or what papers or cards this was computed from, do you?

The Witness: Only from what he told me, your Honor.

The Court: That would be hearsay. Anything else on this subject with this witness?

Mr. Schmidt: I wanted to go on to the rest of his affidavit. If your Honor is making a ruling I can't—

The Court: What did you want to examine him on?

Mr. Schmidt: For example, I find in paragraph eight of his affidavit, his earlier affidavit, he makes a statement that there were 1176 delegates eligible, although the credentials committee report says it is 2019 delegates, and I wanted—

The Court: I would like to have some explanation of that discrepancy because it is important perhaps in the counting of the votes. I will allow that.

Q. Mr. Scola, I show you your earlier affidavit of September 18th, and I refer you to paragraph eight thereof. Will you please read that to yourself.

(Witness examines document.)

A. Yes; all right.

[fol. 152] Q. Can you tell me what is the total number of delegates who were reported as eligible to vote at the 66th Convention?

A. 1176.

Q. Will you please point out in the official proceedings the source of that answer?

Mr. Dannett: It appears, your Honor, on page 30 of the official proceedings, at the bottom of that.

A. On page 30 of the official proceedings of the 1963 Convention.

The Court: That is at the bottom of the page, where it says "Number of delegates, 1176."

Q. Now, I refer you to page 57 of the official proceedings, and refer you to the top line in the first column, which specifies total number of delegates as 1219. Can you explain why the election committee report included that as the total number of delegates?

A. The only thing there, that election committee report of the 1219, the report of the committee, was not put in properly.

The Court: You say—

The Witness: They copied the wrong figure down.

The Court: You say the 1219 is incorrect?

The Witness: Yes, your Honor.

Q. You think it is incorrect?

A. Yes.

Q. Now, I refer you to pages 34 and 35 of the official proceedings, the report of the credentials committee. First, I want to ask, what is the credentials committee, and what is its function?

A. The credentials committee functions by checking all the credentials that have been received at the time immediately prior to the convening of the convention. They are the credentials received in the secretary's office from the various locals throughout the country.

[fol. 153] Q. Are these delegates elected in the locals by secret balloting?

A. Yes, they are.

Q. And the local sends some form of notification to the credentials committee, is that correct?

A. No.

Q. How does it work?

A. The credential blank forms are sent out to the locals based upon the number of members they have from our previous count with the per capita tax, as to their eligibility to send one, two or three delegates, as the case may be. Eventually, that local will send the credential properly filled out with the seal, and the signature of the officers, and whatnot, to the secretary's office.

We in turn acknowledge those credentials, and keep those credentials until such time as the convention convenes, where the night before the official convening of the convention the credentials committee sits to check on the credentials that have been received, and for that reason at that time there were 1219 credentials received. But 1219 delegates did not attend the convention.

Q. Unless the credentials committee approves the credential the delegate is not permitted to vote, is that correct?

A. If the credential was not accepted by the credentials committee he would not be eligible to be seated at the convention.

The Court: You say that 1219 were approved, but only, in effect, 1176 appeared?

The Witness: Some of them didn't show up.

The Court: Is this printed report, page—

Mr. Schmidt: 34 to 35?

The Court: No, page 7, where it commences with the various locals and gives the names and addresses of the delegates—is that a list of those actually in attendance?

The Witness: That's correct, your Honor.

The Court: From it was eliminated the names of all who were not in attendance, even though they may be approved as to the convention?

[fol. 154] The Witness: That's correct, sir.

The Court: Have you, or has anybody under your supervision, totalled the number of delegates listed here?

The Witness: Yes, your Honor.

The Court: That is 1176?

The Witness: 1176.

Q. Mr. Scola, isn't it the function of the credentials committee to file a report of its investigation of credentials?

A. Yes.

Q. And isn't it one of the functions of the credentials committee to certify the number of delegates who are entitled to be seated?

A. That is correct.

Q. Is the report on pages 34 and 35 the report of the credentials committee?

A. Yes.

Q. I call your attention to the last senfence of the first paragraph: "1219 delegates from 626 locals are represented here and are certified by your committee." Can you explain the meaning of that sentence?

Mr. Dannett: I submit, your Honor, that the question is objectionable.

The Court: Overruled. If he knows.

As he has testified just a few minutes ago, the credentials committee certified, that here the credentials committee purports to state that 1219 delegates from 626 locals are represented here. Is that statement correct?

The Witness: Well, that is a matter of verbiage that they used, your Honor.

The Court: It isn't a matter of verbiage, it is a matter of fact, isn't it?

The Witness: The fact is that 1219 credentials were received by the secretary's office, and 1219 delegates would have appeared at the convention, except somebody was sick or just a last-minute change. There would have been 1219 delegates.

[fol. 155] The Court: To your knowledge, is there any check by the credentials committee as to those who actually appeared?

The Witness: Yes, they check the credentials, your Honor.

The Court: You tell me actually there were 1176 there, whereas the credentials committee reports 1219. How could you account for that?

The Witness: The credentials committee reports 1219 credentials received, your Honor.

The Court: That isn't what it says. All right.

* * * * * * *

Mr. Schmidt: May I be heard on that particular point, because that was the second thing I wanted to advert to.

I maintain that the evidence here shows prima facie that at the very least there was a deliberate attempt on the part of officers who have fiduciary duty to make full disclosure to keep their proposal secret from the membership and from the locals until practically the time when they were asked to vote upon it. And they not only did this in the negative way of withholding their recommendation, although this man's testimony and his affidavit is that they were discussing it for two years, but they did it more positively by deliberately misinforming the delegates and the membership as to the significance of this Court's decisions and the decisions of the Court of Appeals.

The Court: How can I go into that if the vote was valid? I don't think it makes any difference.

Mr. Schmidt: Under Section 501(A) of the act, you can go into it.

The Court: What does that say?

Mr. Schmidt: That states that officers of the union are fiduciaries vis-a-vis the locals and the members, and for that very reason it is incumbent on them not to mislead the [fol. 156] membership. I say the membership was misled and, as a matter of fact, the record here—

The Court: If that is a valid objection there might be some issue of fact on that. I am not saying there is. I thought I could decide this on the basis of the vote, and that is all I would have to do, on the method of the vote. That has been my purpose.

* * * * * * *

The Court: With due respect to the Rule 56 and the admonition of the appellate courts that the district court should question the lawyers, I am not certain this kind of inquiry in testimony is such that would properly fit into a motion for summary judgment. I allowed the examination on the vote because that is a narrow, factual, tangible issue.

Mr. Schmidt: Then I have no further questions.

The Court: I will sustain the general objection.

Mr. Schmidt: All right.

The Court: Any questions from you, Mr. Dannett?

Mr. Dannett: Yes.

By Mr. Dannett:

Q. Mr. Scola, are there any members who are members of more than six locals?

A. None that I know of.

Mr. Dannett: That is all of this witness.

The Court: I will ask this question: Do you know of any provisions of the bylaws which either permit or prohibit the counting of these multiple memberships under a roll call?

The Witness: No, I know of no provision one way or the other, sir.

The Court: Do you know of any past precedents one way or the other?

The Witness: No, because this is the first experience I have had with rollcall votes since I have been going to conventions.

[fol. 157] The Court: As far as you know, there were no other rollcall votes since you have been going to conventions?

The Witness: Yes.

The Court: When did you start?

The Witness: 1944 was my first convention.

The Court: All right, that is all.

(Witness excused.)

The Court: Do you want to examine Mr. Neri?

Mr. Schmidt: I do want to examine Mr. Neri.

Ernest Neri, called as a witness, having been duly sworn, was examined and testified as follows:

By Mr. Schmidt:

Q. What is your office in AFofM?

A. Supervisor of the IBM department.

Q. How long have you been supervisor of this department?

A. Thirteen years.

Q. Are you a member of the AFofM?

A. No, I am not.

Q. You are a paid employee of the AFofM?

A. That's right.

Q. Prior to the thirteen years you speak of, were you employed by the AFofM?

A. No, I wasn't.

The Court: Were you employed by the IBM?

The Witness: That's right.

Mr. Schmidt: That is what I was going to ask next.

Q. Did you execute this affidavit on September 30th, which I am showing you?

A. That's right.

Q. Did you actually dictate this affidavit yourself?

A. To the lawyer, that's right.

Q. I beg your pardon?

A. I did give him the information, to the lawyer.

[fol. 158] Q. You gave the information to your lawyer?

A. Yes.

Q. And he dictated it?

A. Well—

Q. Is that right?

A. Yes.

Q. Then did you read it before you signed it?

A. That's right.

Q. Where did you get the statistics that appear at the end of your affidavit?

The Court: In paragraph nine.

Q. In paragraph nine, yes.

A. On IBM cards.

Q. In what form does the information from which you compiled these statistics appear in the IBM cards?

A. In what form?

Q. Yes.

A. There is the name and street address and city and state and social security number on the IBM card.

Q. Do you have one of those cards here?

A. Yes, I do.

Q. Would you get it, please?

(Document handed to counsel.)

Q. You handed me two IBM cards, one with the name George W. Saunders, and the other—no, both with the name George W. Saunders, but one with an address at 262 Prospect Avenue, and the other with a notation, Allied Asphalt Co. Would you explain what those notations mean?

A. Yes. In Local 204 he gave his address as this here.

Q. As Allied Asphalt Co.?

A. Right. In Local 746 he gives that information as his address.

Q. In other words, these two cards refer to a union member named George W. Saunders?

A. Right.

Q. And it contains the number of some locals?

A. That's right.

Q. And this one contains the number—

A. Of Local 204.

Q. —of Local 204, and this one of Local 746?

A. Right.

[fol. 159] Mr. Dannett: Would you read the rest of the information, or refer to it? They both have social security numbers, I believe.

Mr. Schmidt: I am coming to it.

Q. Now, next to the number of the local, and just to the right of it, appears another number. What is that?

A. That is the social security number.

Q. And that social security number would have to be the same for George W. Saunders on both cards?

A. Yes.

Q. What is the "29" next to that?

A. That is a state code.

Q. What does that mean?

A. In other words, for New Jersey the state code number is 29.

Q. What does the word "Dunellen" next to it mean?

A. That is a city.

Q. That is the city where George Saunders lives?

A. That's right.

Q. What about the perforation?

A. The perforation in the card indicates whatever is on the face of the card. These holes are passed through a machine, and it reads the card and interprets the information from the top of the card.

Q. In other words, the very message typewritten there appears now in the form of perforations so you can use the machine to isolate different cards?

A. Right.

Q. How many cards of this kind do you have in your IBM department at the AFofM?

Mr. Dannett: I object to the question. I don't know what "this kind" means.

The Court: Sustained as to form.

Q. How many membership cards do you have in your IBM department for the AFofM?

A. There's approximately 280,000 cards in the whole files, all the files.

Q. Do you have the exact number, or are you just making an estimate?

A. No, that is approximate.

[fol. 160] Q. Do you have the exact number?

A. No, because these files are constantly being marked on every day as changes and new members and cancellations come in.

Q. Did Mr. Scola, prior to your execution of this affidavit of September 30th, come to you and ask you for certain information?

A. That's right.

Q. What did he ask you?

A. He asked me to take out my dual membership files and give him a breakdown of how many members belong to two locals, three, four and five; and so on down.

Q. Did you do that?

A. That's right.

Q. What did you report to him?

A. I reported to him that for dual members of two locals there was 11,145; for three locals there was 1,074; for four locals there was 152; for five locals there was six; for six locals there was four, which gave me a total of 12,381.

The Court: How did you ascertain that?

The Witness: Through IBM machines, sir.

The Court: Does the card indicate the number of locals that the man is a member of?

The Witness: Yes, the card—I have two cards or three cards, if he belongs to more than one local. Then we run it through the tabulator with a summary punch which reads the social security number on the summary punch card. It comes up with how many locals this members belongs to.

Q. So that you processed all of the AFofM cards in your department for the purpose of getting the information Mr. Scola requested?

A. Just for the dual memberships. Just the members that belong to more than one local. We have a separate file for them.

Q. Oh, you keep the cards for dual membership in a separate file from the others?

A. That's right.

Q. So that you didn't have to put through the machine [fol. 161] all of the membership cards?

A. No, that's right.

Q. Just those that concerned dual membership?

A. Right.

Q. When did you make that report to Mr. Scola?

A. Monday.

Q. That is this past Monday?

A. No, this Monday.

Q. Monday of this week?

A. Yes. I gave him the full information, because I was working on a certain amount of trays each day, and I came up with this thing.

The Court: How do you know you have all the duplicate members in that file?

The Witness: Well, as far as we know we have as many as we found that the machine could read as a duplicate or a triplicate card.

The Court: You say that the cards of all the multiple members are filed separately, is that so?

The Witness: Yes.

The Court: How do you know that they get into that file as soon as they become multiple members?

The Witness: When a member comes in as a new member, we cut another card like this in a different color. When the machine reads that this card is going in, and it matches with

another card with the same social security number, it will select it out.

The Court: The machine does all that?

The Witness: That's right.

Q. Doesn't that mean you have to put all of the cards in at one time before you can select out those which are dual membership cards?

A. No, because when the girl gets these slips she checks them. If there is a change of address she checks it in one file, which is a master file alphabetically. And from this master file she can determine right away if it is a dual member. If it is a dual member she puts a little marking on the slip, and this slip is processed. Instead of one card to be [fol. 162] picked up, it picks up two, one for the master file and one that goes into the dual file.

Q. Can you state with certitude now that if you processed the vast number of cards for the entire membership of the AFofM through your IBM machine, and set the IBM machine to select out dual memberships, that it would result in no more than 12,381 dual memberships?

A. No, it might be able to get more out. Each time as the girl—sometimes there might be a difference in name, but the same social security number. It might appear later on. If we get a social security number in one or two or three days, then we have to pull the card out, put the social security number in, and then when it is filed it matches up with another local, and we pull them out and make him a dual.

Q. So if you did process all the AFofM cards, you might not come up with the same result you have given in your affidavit?

A. It might come up with more.

Q. Can you estimate how many more?

A. That I couldn't.

Q. Did Mr. Scola before Monday ask you for any information respecting dual memberships?

A. That's right, he asked me the beginning of last week if it was possible for me to determine the duals of two locals, three, four and five.

Q. Did you at any time give him any information to the effect that there were 26,000 members of the AFofM with membership in two or more locals?

A. I gave him a total of 26,174 when I finished the whole job. That was Monday.

Q. I mean prior to last Monday, did you ever give him any statistics showing a total of 26,000 members of the AFofM who belonged to two or more locals?

A. Well, no, I knew approximately, but I didn't know for sure until I finished the whole job.

Q. Did you estimate approximately that there were 26,000?

A. No, I didn't.

[fol. 163] Q. What information did you give him prior to Monday, when you gave him the accurate information that you talk of in your affidavit?

A. Each day as we were working on it I gave him a breakdown of how many cards I picked out as a dual, but I didn't give him a full total until I was finished. But we knew there was approximately 26,000.

Q. But prior to Monday, when you gave him the breakdown that you have just read into the record, did you give him any 26,000 estimate?

A. No.

The Court: Did you supply the number of members of each local to some officer before the convention?

The Witness: No, sir.

Mr. Schmidt: I have no further questions.

By Mr. Dannett:

Q. Mr. Neri, am I correct that sometime in the latter part of 1959 you were requested to ascertain the number of duplicate memberships?

A. That's right.

Q. Who made that request upon you?

A. Mr. Ballard.

Q. Do you know the reason for the need for ascertaining the number of duplicate memberships?

A. Yes. Some of the members were getting more than one magazine—that is, the International publication.

Q. And the purpose of your inquiry was to eliminate the duplicate mailing of the magazine to members?

A. Right.

Q. In order to obtain that information, what data did you need from members?

A. Their social security number.

Q. Was a letter written to locals asking them to furnish social security numbers of their members?

A. That's right.

Q. When was that done?

A. September 25, 1959.

Q. Did locals furnish the information requested?

A. That's right.

[fol. 164] Q. When the information came in, what was done with it?

A. We took the social security numbers from the list that they sent in to us, and we recorded it on the membership card.

Q. And these are the IBM cards to which you refer?

A. That's right.

Q. So that at that time—and we are now speaking of 1959 and 1960, is that correct?

A. Right.

Q. So that at that time you ascertained from the total AFofM membership the total of duplicate memberships?

A. Right.

Q. Do you recall how many duplicate memberships there were at that time?

A. No, we had no—we didn't have to have the figure on it.

Mr. Schmidt: I can't hear the witness, your Honor.

The Court: Speak up.

A. We didn't have a figure on it, because nobody ever questioned me on the figure of how many members were total, because that was only for my purpose of pulling them out of the geographical file, which was the mailing file.

Q. When you ascertained the number of duplicate memberships, am I correct that you then placed in a single file the cards to show the duplicate memberships?

A. That's right.

Q. And it is that file from which this present study was made, is that correct?

A. That's right.

Q. And that study is shown in your affidavit in paragraph nine?

A. That's right.

Q. As far as you know, is this substantially correct?

A. That's right.

Q. There may be some slight differences, is that correct?

A. That's right.

Mr. Schmidt: I object to the leading of his witness in that manner.

The Court: Overruled as to that.

[fol. 165] Q. In your opinion, to what extent, if any, might there be any variances between these figures and what might be the actual dual membership list?

A. I don't quite get you on that question.

Q. Do you think there is any material difference between the actual memberships and those stated in your affidavit in paragraph nine?

A. No.

Mr. Dannett: That is all.

Mr. Schmidt: I have one or two more questions, if your Honor pleases.

By Mr. Schmidt:

Q. Can you give us the total number of International Musicians' subscriptions?

A. There's about approximately 255,000. Approximately.

Q. Can you tell us, of that 225,000, how many are sent to non-members?

A. I couldn't tell you on that.

Q. Will your cards show how many are sent to non-members?

A. No, we have no record of that.

Q. You do know that many are sent to non-members, though, do you not?

A. That I have no knowledge.

Q. You don't know that, either?

A. No, I don't think there would be any non-members, because every one of them has a local number, so he must be a member of the Federation.

Q. Aren't there complimentary copies sent to union leaders of other unions?

A. No, that doesn't go through me. I have nothing to do with that.

Q. Then what is the difference, the discrepancy, between the 255,000, which is your estimate of the subscriptions to the magazine, and 280,000 which is the total membership?

A. Well, there is a possibility that magazines come back to us as undeliverable.

Q. Thirty thousand of them?

A. That is possible.

Mr. Dannett: That is 25,000.

Mr. Schmidt: 25,000.

[fol. 166] Mr. Dannett: And we stated the figure as 26,000, your Honor, in our papers, of the dual memberships.

Thank you, Mr. Schmidt.

The Court: I want to ask a question for the record of Mr. Dannett.

Article V of the Constitution and Bylaws of the American Federation of Musicians, which is attached as an exhibit to your moving papers, the next to the last sentence of Article V, on page 9, says: "All laws so passed shall be referred to a convention committee consisting of the executive board AFofM, and chairmen of all committees, who may sanction or vote on same, their action to be final."

Is it your answer that that applies to the action taken at this convention?

Mr. Dannett: Yes, your Honor, and it was so done.

The Court: Was that done, and if so does it appear in this record?

Mr. Dannett: Yes, your Honor.

The Court: Where is it in the record?

Mr. Dannett: The affidavit of Mr. Scola so states. I will refer to the specific page.

The Court: All right, as long as it is there. Is that all?

Mr. Dannett: Yes, it is. And may it please your Honor, Mr. Schmidt, who made an issue of fact of this in his complaint, in his 9(G) statement does not.

Will you step down, Mr. Neri?

(Witness excused.)

The Court: Is there anything else before I close this matter?

Mr. Schmidt: Yes.

The Court: I don't believe I have any brief from you, do I, Mr. Schmidt?

[fol. 167] Mr. Schmidt: May I ask Mr. Scola one further question, possibly two?

The Court: Yes. Mr. Scola, will you come up here?

GUY A. SCOLA resumed.

By Mr. Schmidt:

Q. Mr. Scola, were the credentials for each of the delegates to the 66th Convention kept by some officers, or some office in your union?

A. Yes, up until the Convention. You bring them with you to the Convention, a duplicate copy. The credential was sent in duplicate. The delegate retains one, we retain the other.

The Court: What did you do with the ones you retained?

The Witness: Brought them to the Convention, and turned them over to the credentials committee chairman for scanning.

Q. Did the credentials committee chairman give them to you or to your office to keep?

A. They were returned to us.

Q. Are they in your possession now?

A. Yes.

Q. So that they could be counted?

A. Yes.

Q. I see. One further question: Can you refer us to any section of the Constitution or Bylaws of the Federation that permits the splitting of votes of delegates?

Mr. Dannett: This is objected to, your Honor.

The Court: He may not be qualified. Is that the basis of the objection?

Mr. Dannett: Yes, your Honor. Well, no, my basis is this is not one of the subjects of inquiry.

The Court: I will allow it, if that is the only objection.

[fol. 168] Q. Are you familiar with the Constitution and Bylaws of the AFofM?

A. Somewhat, yes.

Q. On the basis of your familiarity with those documents, can you refer us to any section of the Constitution and Bylaws which authorizes the splitting of votes such as happened about twenty-times in the 66th Convention?

A. I know of no law one way or the other on that point.

Mr. Schmidt: Thank you, that is all.

Mr. Dannett: You may step down, Mr. Scola.

(Witness excused.)

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COLLOQUY BETWEEN COURT AND COUNSEL

The Court: It was apparently not a unit vote on some at least, because there was a split vote. Is there anything in the record to determine when there was a unit vote and when there was a split vote?

Mr. Dannett: Yes, we have stated in the affidavit that the chair announced, at the commencement of the vote, that the delegates of each local would have the option either to cast a single ballot which would be equal to the membership of the local or would have the option to split the vote.

The Court: Is that in this record here?

Mr. Dannett: Yes, sir.

Mr. Schmidt: Where?

Mr. Dannett: It is in my affidavit, your Honor, in the affidavit of Mr. Scola.

Mr. Schmidt: Where?

The Court: But it is not in the proceedings.

Mr. Dannett: It is not in the official proceedings, but it is in Mr. Scola's affidavit.

Mr. Schmidt: Where in Mr. Scola's affidavit?

The Court: In the first affidavit?

Mr. Dannett: Yes.

Mr. Mittelman: I believe it is paragraph 26.

[fol. 169] Mr. Dannett: "The chair announced"—page 13. It is the first full sentence on the top of that page.

The Court: This is page 13 of his affidavit?

Mr. Dannett: Yes. "The chairman announced that a roll-call vote would be taken, that delegates representing locals would have the option of voting as a unit based upon the membership of their locals or to split their votes."

The Court: So that we have that complicated situation in which in some cases the delegates took it into their own hands to say how the vote of the local should be taken—

Mr. Dannett: Just as at presidential nominating conventions the delegates from states are given the option to vote either as a unit or to split the vote, so similarly it was done here. There is nothing unusual about this. This is a representative vote. And quite properly the chairman, and I think democratically, offered the choice to these various delegates.

The Court: What it means from the so-called democratic standpoint is that the delegates decided how the vote of the members should be split, isn't that so?

Mr. Dannett: That is correct, sir.

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Mr. Dannett: The question, your Honor, that you have to consider is whether you will approve of a system which would destroy democracy within unions, because if you give one vote—

The Court: Let me say as to that that the substitute is not democracy. In other words, there is a provision in the statute—which is democracy, I suppose, or at least it is represented to be democracy—3(B)(2), which is direct democracy. That is a referendum to every member in good standing.

[fol. 170] Mr. Dannett: Holding a meeting of 260,000 members, your Honor, the cost of that kind of meeting would be absolutely prohibitive.

Mr. Schmidt: It is a referendum.

Mr. Dannett: And because of that Congress recognized—

The Court: It may be the cheaper and mistaken method which might have resulted in an illegal vote.

Mr. Dannett: It might, your Honor, if it was mistaken, which I submit it was not.

The Court: That is the thing, unfortunately, which I have to decide.

* * * * * * *

Mr. Schmidt: Your Honor, may I address myself to the remarks just made?

The Court: Yes.

Mr. Schmidt: Before I do that, I would like, in view of the importance Mr. Dannett attached to certain things that he said, to call Mr. Scola to find out whether or not they kept stenographic minutes of the proceedings at that Convention.

The Court: You may. If he knows.

Mr. Schmidt: Mr. Scola.

Guy A. Scola resumed.

The Court: This is, I assume, directed particularly to this alleged announcement of whether the vote might be a unit or split.

Mr. Schmidt: Right.

By Mr. Schmidt:

Q. Mr. Scola, you said before that you were present during the sessions of the Convention?

A. That's correct, sir.

[fol. 171.] Q. Were you on the dais?

A. Yes, sir.

Q. Do you know whether or not any stenographer was employed to take verbatim minutes of the remarks made at that convention?

A. None were employed to take verbatim minutes, but notes were made.

Q. Who made the notes?

A. The secretary, myself.

Q. Who else?

The Court: Are you a stenographer?

The Witness: I am equipped to take notes, sir, yes, sir.

Q. Shorthand notes?
A. Yes, sir.
Q. You can write shorthand?
A. Yes, sir.
Q. Did you take some of the proceedings in shorthand?
A. Yes, sir.
Q. Are all of your notes transcribed in the minutes of the official proceedings?
A. They are transcribed to the extent—
Q. Are they transcribed verbatim as you wrote them, as you took them down?
A. No, because I don't use them for that purpose.
Q. Were your minutes typed at any time?
A. The proceedings are the result of my—

The Court: No, he didn't ask you that.

Q. That isn't my question.

The Court: He asked you whether or not your record of the proceedings at the convention which you indicate that you took in shorthand, were those transcribed fully by you?
The Witness: Yes, sir.
The Court: Where are they?

Q. Do you have a copy of them here?
A. That is the result of a copy of my transcript.
[fol. 172] Q. I didn't ask you that. Do you have a copy of your verbatim transcription here?
A. No, I don't.
Q. Is it available for the Court?
A. The notes that I took?
Q. Yes.
A. They won't appear that way, sir. I have to make explanation.

The Court: How were they taken? Explain how they were taken, in shorthand?
The Witness: Some in shorthand, some in longhand.
The Court: Did you take any notes with reference to any announcement by the chairman with regard to the method of vote of the respective delegations?
The Witness: No. I had a tape recorder besides the notes I took.

The Court: Did you transcribe from this tape recorder?
The Witness: Some of it I have, yes.

Q. Who has the tape recording now?
A. The tapes are in my office.
Q. Are they audible, so you can listen to them?
Q. You can listen to them, yes.

Mr. Schmidt: Your Honor, I think that it is very important sooner or later in this proceeding for us to get a complete transcription—

The Court: You are getting me into a trial, that is all.

Mr. Schmidt: I don't want to get you into a trial at this stage, and I am not saying it has to take place before you make—

The Witness: Why don't you let me swear there was an explanation.

The Court: Will you please keep quiet, unless any question is asked you.

The Witness: I am sorry, sir.

[fol. 173] The Court: Are you a lawyer?

The Witness: No, sir. I am sorry.

The Court: Just answer questions. I don't mean to criticize.

The Witness: I'm sorry.

Q. Did you take verbatim—

Mr. Dannett: I object to any further questions along this line, your Honor. I don't see what issue of fact these questions are addressed to.

The Court: They are addressed to the method of taking this vote, whether there was a split vote or a unit vote, and whether the delegates were told that they had a choice.

Mr. Dannett: Mr. Schmidt still hasn't asked that question. Why doesn't he?

Mr. Schmidt: I am coming to it. I have not finished.

The Court: Of course, this witness has made an affidavit that there was. He may come to it, if he wants to, if he wants to ask him.

Q. You were present at the evening session, were you not?
A. Yes, sir.

Q. You were also on the dais?

A. Yes, sir.

Q. Did you transcribe verbatim the remarks of the chairman prior to the taking of the vote?

A. No, sir.

Q. That was recorded, however, on the tape?

A. Yes, sir.

Q. Did you make any kind of notation of what the chairman said in respect of the taking of the vote on recommendation No. 11?

A. I don't recall, sir.

The Court: What is that?

The Witness: I don't recall. I don't think so.

Mr. Schmidt: I have finished with the witness.

[fol. 174] By Mr. Dannett:

Q. Mr. Scola, what did the chairman say with respect to the roll-call vote?

A. The chairman—someone asked the question, as I recall, what does a roll-call vote mean? And the chairman gave the explanation that the delegates where they come from a local vote their local number yes or no, if there was more than one delegate and there was a division among those delegates as how they felt upon the motion or the action that was before them, they would call out their number and represent what portion or share of the membership they were voting yes or no.

The Court: Will you read that answer?

(Answer read.)

The Court: Is that all he said on that subject?

The Witness: That is all I recall offhand, sir.

Q. May I just ask, was anything said with respect to voting—total delegates voting as a unit or splitting the votes?

A. The explanation was made that those who wanted to split their votes had a right to do so.

The Court: Is that all? Is that all that was said about it.

The Witness: That is all I recall, sir, yes, sir.

By Mr. Schmidt:

Q. Was there any explanation made about the split vote in the case of Local 204, where one vote was cast for yes, and 540 cast for no?

Mr. Dannett: That is objected to. That is the vote as actually cast. How could there have been a question as to how they were going to vote?

The Court: Sustained.

Mr. Schmidt: I have no further questions of this witness.

[fol. 175] The Court: Was there anything said about options? Was that word used?

The Witness: Will you explain that?

The Court: Was there any word such as "option" used by the chairman?

The Witness: I don't recall. I don't remember.

The Court: All right.

Mr. Schmidt: I have no further questions of this witness.

October 16, 1963
10:15 a. m.

(Same Appearances)

COLLOQUY BETWEEN COURT AND COUNSEL

* * * * * * * *

Mr. Dannett: The second voice vote was referred to in my papers. It is not in the official proceedings. Here is an affidavit. This is annexed to an affidavit which I submitted. It is an affidavit of Mr. Carruthers, who is an employee of the Federation. He annexes to it a Toronto paper in which it says as follows: "The long discussion resulted in a night session called and at midnight the question was called. President Kenin could not make a decision on the oral vote of ayes and nays after two attempts. This resulted in a roll call."

* * * * * * * *

Mr. Dannett: * * *

So that there were two roll calls. What difference does it make? The president, the chairman, couldn't determine

whether the vote was carried on a voice count, and therefore he was required, under Roberts rules, to take the next step. Let me just read—

The Court: He was required to take a standing or hand vote under Roberts Rules—

Mr. Dannett: Yes, sir.

The Court: He was not, as I see it—I may be wrong—but as I see it he wasn't required to proceed under Article V. [fol. 176] Mr. Dannett: Your Honor, I differ there, if you don't mind.

The Court: I know you do.

Mr. Dannett: May I point out that Roberts Rules and the by-laws are subject to the provisions of the constitution. The constitution contains provisions for two types of weighted votes: The first in which each delegate gets one vote per 100 members, but not to exceed 10 votes per local, and the second is the weighted roll call vote that was involved here, which is based on the membership of the local.

Now, when it appeared—incidentally, I might say that the only purpose of the voice vote was to see whether it was carried, I would say, under the first of these two types of roll call votes—weighted votes—and that when the vote was close—obviously how many votes does a voice have where the voice comes from one local representing ten members—the chairman can't possibly determine that. That is why you do have in Roberts Rules, and that is why you do have in the constitution, these provisions which permit the calling of a roll call vote. What Roberts says the rule is: "When the vote is taken by a voice or show of hands any member has a right to require a division of the assembly by having the affirmative rise and then the negative, so that all may see how the members vote. Either before or after the decision any member may call for, or demand, a count . . ."

In this case the demand was made by virtue of the roll call vote asked for by five delegates.

The Court: It was asked for actually by an insider.

Mr. Dannett: That is correct, by one person speaking on behalf of five, and I submit, your Honor, this is drivel, that one person can't say "I speak in behalf of five people,"

and the five are there and the president says, "Do you have anything to say?" And they remain silent.

I say, your Honor, that it is five people speaking, one person speaking and the others acquiescing.

[fol. 177] I say further, your Honor, when the roll call vote was called for, Mr. Tomei, if he thought this procedure was improper, should have raised it by a point of order. He should have said, "This procedure is objectionable."

The Roberts Rules also have a provision there for a point of order being raised.

The Court: Failing to make an objection, does that validate the vote under the statute?

Mr. Dannett: In my opinion—may I get to the statute last, please? I want to deal with it. This is really an objection at this point that we didn't comply with the provisions of our own constitution.

I am saying, your Honor, that when the roll call vote was demanded and when the roll call vote was taken, when no point of order was raised by Mr. Tomei, when Mr. Tomei cast 1500 votes against it, Mr. Tomei, if he were here, the plaintiff, could not now challenge that vote any more so than could a stockholder at a corporate meeting, and I have in my brief cases which show the procedure with respect to stockholders is similar to what I am not asserting here. It is perfectly clear under Roberts Rules of Order that when no point of order is taken, the point was waived, although I submit, your Honor, there was nothing to waive here. The procedure was proper. But if there was a deficiency, as to which I can't find, I say it was waived, that Mr. Tomei having voted against the resolution, if he were here you would say to him, "You voted against it; you had your day to vote against it; you are not now entitled to a second day."

The Court: Frankly, all I am interested in now in getting is, (1) was there any other tape; (2) was there any other determination by the chairman on the vote of the delegates.

Mr. Dannett: There was none that was not given.

The Court: It is contended by the defendant, (1), there was no other tape of this portion at least of the proceedings, and that is all I am interested in.

[fol. 178] Mr. Dannett: That is correct.

The Court: And, (2), the claim is that there was no other determination by the chairman of an oral vote. I take it that is your position.

Mr. Dannett: That is correct. May I, your Honor—I don't think I am being repetitious, but I would like to just say that I feel that the provisions of the Federation's constitution have been observed, and that then brings me to the question which you put before: Have the provisions of Section 101(a) (3) (B) been complied with. That seems to be the one that I believe is giving you some concern.

The Court: I think that is the basic issue here.

. . . . . .

October 18, 1963
10:00 a. m.

. . . . . .

(Same Appearances.)

Mr. Schmidt: The witness who was subpoenaed did not put in an appearance. Perhaps there may be a little delay in the train.

The Court: I think there was an affidavit, Mr. Dannett, do you have that?

Mr. Dannett: Yes, sir, I have it here.

The Court: I have a case proceeding at ten-thirty. However, if your witness appears I will interrupt and take his testimony.

This affidavit is dated October 17 and apparently indicates that only one transcript was made as to that event and that transcript was made including the voting area at the meeting.

Mr. Schmidt: May I be heard for a moment because I read it and it doesn't answer the question your Honor raised at the last hearing. I don't think it is significant [fol. 179] whether or not there were two tapes or one tape or six tapes. I do think it is significant whether the full vote was taken on the tape and the excerpt which is attached to the last affidavit and certified by this Miss Wachtel definitely demonstrates that it does not contain any reference whatever to the voice vote which preceded. It jumps into the middle of things as it were.

Nor does it contain the full rollcall vote, that is to say, the rollcall vote actually taken while the secretary, Mr. Ballard was presiding.

It seems to me on its face it is incomplete and this affidavit simply says it is a transcript of a portion of the recording. This is obvious that it is a transcript of a portion but I don't think that is a portion that is full enough.

The Court: Is the tape here, Mr. Dannett?

Mr. Dannett: The tape is not in court, but we have the tape. We could produce it.

But I submit, your Honor, that I have produced what was called for as I indicated the other day, your Honor.

The Court: I indicated that I did not see any necessity of the tape but in view of what Mr. Schmidt just said, it may be there is an omission from the tape.

Mr. Dannett: As to what? I am not quite clear.

The Court: Apparently the transcript made by Wachtel—

Mr. Dannett: It begins with a request for a roll call.

The Court: But it doesn't contain any reference, does it, to the voice vote?

Mr. Dannett: That is correct. It begins just after the voice vote. I have heard the tape and you merely hear a shout of Ayes and a shout of Nos.

The Court: One vote by that means?

Mr. Dannett: No, there were two.

The Court: Two different voice votes?

Mr. Dannett: In other words, the chairman as I recall it indicated he couldn't tell how the first came out and had [fol. 180] it taken again and then indicated that he had a doubt as to the outcome and immediately after that there was a request for a roll call.

The Court: It will be conceded, will it not, there were two votes orally taken; that is, vocal votes taken and the chairman in each case said that he couldn't determine the result of such vote; is that correct, Mr. Dannett?

Mr. Dannett: That is correct.

The Court: Off the record.

(Discussion off the record.)

Mr. Schmidt: They don't have the answer of the delegates or any explanation which a delegate might have made.

Mr. Dannett: That is exactly the point. We are again going into a further fishing expedition. What difference does it make what answers or explanations were given. That is the reason I have resisted Mr. Schmidt's request for the tape. There is no question, it is indisputable it was adopted by a plurality of 44,000 votes. What difference does it make what anyone may have said? I, incidentally, don't know what was said but what difference does it make?

The Court: It makes no difference if the method itself was correct.

Mr. Schmidt: Right, I agree with that.

The Court: If I decided on that basis, then it makes no difference.

Mr. Schmidt: I agree with that but the very incorrectness of the method might be further demonstrated by a full transcript.

The Court: It is either a correct method or an incorrect method. If it is a correct method but an incorrect result, then there may be a dispute of fact here rather than of law. I don't know.

In other words, to say it another way, if the method itself by a rollcall of delegates as set forth in the official record of the Convention was an incorrect and illegal [fol. 181] method, then it makes no difference as to whether the figures or the statements made by the respective delegates of the different locals is correctly set up or not set up.

Mr. Schmidt: I concede that.

Mr. Dannett: That is correct.

Mr. Schmidt. I contend that the method was incorrect but I also felt that in view of what I thought your Honor at the last hearing, which I was unable to attend, this affidavit is not a complete affidavit of what you had in mind.

The Court: Well, frankly, I had in mind only the reference to the voice vote. I didn't realize there was a contest. I don't know that your associate made it clear to me there was some dispute about the actual count of rollcall voting allegedly made pursuant to Article V of the Constitution. Is that your impression?

Mr. Dannett: I never heard there was a question.

Mr. Schmidt: I am not raising a question about the count. I am assuming they did their arithmetic correctly.

The Court: I am asked to determine on the basis of what the record shows as to that rollcall. If you contest that and I have to conclude or I do conclude that the method is a proper method, then there is a question of fact.

Mr. Schmidt: I am not raising that question, your Honor. I am simply addressing myself to the proposition that the transcript as given does not do what it purports to do. It is only a very partial transcript.

The Court: I tried to analyze the issue insofar as whether it affected the transcript. Unless, as I say, you contend that the vote is improperly recorded, there isn't any issue here unless—

Mr. Schmidt: The only part of the vote that I would be interested would be to learn whether there were any subsidiary instructions for example by Mr. Ballard, even though the chairman, Mr. Kenin, did not make them.

Mr. Dannett: There were no other instructions.

The Court: The chairman indicated that the delegates should split the membership vote as they determine. That is clear in the transcript, as Miss Wachtel translated it.

[fol. 182] Mr. Schmidt: For the purposes of this motion I am not interested, in view of the concession just made by Mr. Dannett, that there were no other instructions, about the splitting, I am not interested in the latter part of the voting.

The Court: All right. Then it is fully submitted.

Mr. Schmidt: But the voice vote, I am interested in; I think it was an illegal procedure.

The Court: Either this motion is fully submitted or it isn't. Now, let us be clear on that. Is it fully submitted on your part, Mr. Dannett?

Mr. Dannett: Yes, sir.

Mr. Schmidt: It is not fully submitted in my opinion, on my part, unless we get a transcript of the portion that concerns the voice vote which directly led to the rollcall vote.

Mr. Dannett: May it please your Honor—

The Court: I don't know how that is going to add anything, Mr. Schmidt, except to indicate that there was a

second voice vote which was inconclusive. What else is there?

Mr. Schmidt: It wouldn't add anything to the contentions I have made. I have made the contention the voice vote was itself improperly conducted and therefore the Constitution was violated because they did not follow the bylaws of the union in following up the voice vote with a rising vote, or if that wasn't conclusive, with a count of those who—

The Court: That is all before me.

Mr. Schmidt: If that is all before you I say it is fully submitted because I don't even have Mr. Tomei's testimony for this motion.

The Court: I will put it this way, Mr. Dannett: Will you concede there was no further attempt to count the delegates' vote other than that which appears in the record by roll calling? In other words, there was no count by hands or by the ballots of the delegates other than this system which appears in the record, namely, by the local allocations?

Mr. Dannett: I concede that.

[fol. 183] The Court: Now, Mr. Schmidt, are you satisfied? Is it submitted?

Mr. Schmidt: Then I am.

* * * * * * *

Mr. Dannett: May I press two points, however? This does not add to anything in the record. Number one, all of our papers in support of the motion in the Wittstein case, I would like to have considered in support of the motion in Schwartz and the opposition papers, of course.

The Court: Yes.

Mr. Schmidt: I join in that.

The Court: Whatever disposition is made of the Convention vote problem in the Wittstein case, of course, will apply to that cause of action in the Schwartz case.

Mr. Dannett: Thank you, sir.

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[fol. 184]

In United States Court of Appeals

For the Second Circuit

Nos. 246 and 247—September Term, 1963.

Argued November 20, 1963.

Docket Nos. 28563 and 28564

Eddie Wittstein, Ben Cutler, Julius Schwartz, Marty Levitt, Claude Garreau, Bert Fisher, George Auld, Leo Greco, Hector DeRienzo, Milton Farowitz and Matt Gillespie, Plaintiffs-Appellees,

—against—

American Federation of Musicians of the United States and Canada, Defendant-Appellant.

Julius Schwartz, Buddy Kane, Robert Curtis, John C. Rosenmerkel, William Arnold, Frances Baron, Leonard O. Gaskin, Louis V. Schwartz, Herbert Wasserman, Judith Bregman, Solomon Kosarin and Glen Williams, Plaintiffs-Appellees,

—against—

Associated Musicians of Greater New York, Local 802, American Federation of Musicians of the United States and Canada, Defendant-Appellant.

[fol. 185]

Before: Medina, Waterman and Marshall, Circuit Judges.

Appeals from judgments of the United States District Court for the Southern District of New York, Richard H. Levet, *Judge*.

American Federation of Musicians of the United States and Canada and Associated Musicians of Greater New York, Local 802, appeal, respectively, from two summary judgments granted in consolidated actions holding invalid

the action of the June 1963 Convention of the Federation increasing dues. Opinion below reported at —— F. Supp. ——. Affirmed.

Godfrey P. Schmidt, New York, N. Y., for plaintiffs-appellees.

Emanuel Dannett, New York, N. Y. (Henry Kaiser and George Kaufmann, Washington, D. C., Jerome H. Adler, Herbert D. Schwartzman, Eugene Mittelman, and McGoldrick, Dannett, Horowitz & Golub, New York, N. Y., for defendant-appellant, American Federation of Musicians of the United States and Canada, and David I. Ashe and Ashe & Rifkin, New York, N. Y., for defendant-appellant, Associated Musicians of Greater New York, Local 802, on the brief), for defendant-appellant, American Federation of Musicians of the United States and Canada, and defendant-appellant, Associated Musicians of Greater New York, Local 802.

[fol. 186]

OPINION—December 18, 1963

MEDINA, Circuit Judge:

As a result of our decision in *Cutler* v. *American Federation of Musicians*, 2 Cir., 1963, 316 F. 2d 546, cert. denied, December 9, 1963, —— U. S. ——, holding invalid the 10 per cent travelling surcharge imposed by certain provisions of the By-laws and Constitution of the Federation, an attempt was made to supply funds deemed necessary to take the place of the travelling surcharge by presenting for adoption at the ensuing Annual Convention of the Federation held in June, 1963, a resolution increasing per capita membership dues. When this resolution was passed these consolidated actions were brought by individual members of the unions to challenge the validity of the dues increase on the ground that it violated the provisions of the Labor-Management, Reporting and Disclosure Act of 1959, Section 101(a)(3)(B), 29 U. S. C., Section 411(a)(3)(B). Judge Levet sustained this contention and held the action of the Convention in passing the increase of dues

resolution void, on the ground that the Act required that each delegate cast only one vote, whereas the roll call method pursued at the Convention allowed the votes of the delegates to be weighted in such manner as to count as votes by the number of members in the locals represented by the delegates, and not by counting the vote of each delegate as a single vote. His opinion, *Wittstein* v. *American Federation of Musicians*, S. D. N. Y., 1963, is reported at —— F. Supp. ——. Numerous other miscellaneous points are raised, especially in the brief of appellees, but, as we agree with Judge Levet on the principal question of law involved, we do not find it necessary to discuss the other points.

The two cases were disposed of by summary judgments for plaintiffs. In *Wittstein, et al.* v. *American Federation of Musicians of the United States and Canada* the judgment is final. In *Schwartz, et al.* v. *Associated Musicians of* [fol. 187] *Greater New York, Local 802, American Federation of Musicians of the United States and Canada*, only the first count of the complaint was dismissed, as other questions than those discussed in this opinion were raised, but Judge Levet made the customary finding and order prescribed by Rule 54(b) of the Federal Rules of Procedure. Thus appeals by the Federation and by Local 802 are properly before us.

The controlling language of the 1959 Act, Section 101 (a)(3)(B), 29 U. S. C., Section 411(a)(3)(B), applicable specifically to "Dues, Initiation Fees, and Assessments" provides that rates of dues and initiation fees payable by union members shall not be increased except

> "(B) in the case of a labor organization, other than a local labor organization or a federation of national or international labor organizations, (i) by majority vote of the delegates voting at a regular convention, or at a special convention of such labor organization held upon not less than thirty days' written notice to the principal office of each local or constituent labor organization entitled to such notice, or (ii) by majority vote of the members in good standing of such labor organization voting in a membership referendum conducted by secret ballot, or (iii) by majority vote of the members of the executive board or similar govern-

ing body of such labor organization, pursuant to express authority contained in the constitution and by-laws of such labor organization: *Provided,* That such action on the part of the executive board or similar governing body shall be effective only until the next regular convention of such labor organization."

These provisions apply to the Federation, which is a labor organization other than a local labor organization or a federation of national or international labor organizations [fol. 188] within the meaning of the Act, and the Federation is conceded to be a labor organization in an industry affecting commerce as defined in Section 3(i) of the Act, 29 U. S. C., Section 402(i).

Article 5 of the Federation's Constitution contains the basic rules governing "Representation and Delegates," as follows:

"All Locals of this Federation of one hundred and fifty members or less shall be entitled to one delegate. All Locals shall be entitled to one delegate for each one hundred members or a major fraction thereof, not exceeding three delegates for any one Local, but each Local shall be entitled to one vote for each one hundred or major fraction thereof, but no Local shall cast more than ten votes, and the number each Local is entitled to shall be computed from the last report made on January 1st before the convention by the Local, according to the books of the Treasurer. On questions affecting a change in the laws, each Local may, upon roll call, cast as many votes as it has members, as per book of the Treasurer, A. F. of M. All laws so passed shall be referred to a convention committee consisting of the Executive Board, A. F. of M., and chairmen of all committees, who may sanction or veto same, their action to be final. Roll call shall be demandable and had under this Article on demand of ten delegates or five Locals."

And the By-laws, in Article 28, relating to Convention Proceedings and the order of business at such conventions, prescribe

"Section 2. For Rules of Order, Robert's Revised Manual shall be the guide unless otherwise provided, and the manner of voting shall be viva voce, unless [fol. 189] otherwise ordered. The vote at elections or the vote on roll call shall be in accordance with Article V of the Constitution."

The procedure followed at the June, 1963 Convention followed this pattern to the letter. We find nothing to support appellees' protestations to the contrary. Two voice votes of the delegates were inconclusive, there was a demand by five locals or more for a roll call. At the roll call the votes of the delegates were weighted in such fashion as to record in favor of or against the resolution not the number of delegates but the number of members of the local represented by the delegates. Thus Local 802, represented by two delegates,[1] cast 28,438 votes against the resolution.[2]

As we read the Constitution and the By-laws, the decisive vote was required to be by roll call, on proper demand, and such a demand must be complied with, irrespective of the result of any prior voice or standing vote. Thus, even if the voice vote had been clearly one way or the other, and even if a standing vote thereafter taken had been equally plain for all to see, the roll call, on proper demand, would decide the issue. Otherwise, the provisions of the Constitution and By-laws make no sense. Indeed, we have no reason to doubt that a proper demand for a roll call would have to be acceded to, even if made prior to the taking of any voice or standing vote.

Moreover, as appellants claim to be the case, the weighted voting is to all appearances the most "democratic" method, in the sense that each member is duly "represented," and it is a method of voting widely recognized as fair and [fol. 190] proper by a number of unions. Not only are simi-

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[1] Local 802 was entitled under the Federation's Constitution to three delegates.

[2] As not affecting the result, in the view we take of the applicable law, we do not discuss the split or duplicate votes cast at the 1963 Convention.

lar provisions to be found, with some variations of detail, in many representative union constitutions or by-laws, but it may fairly be said that the passage of the Labor-Management, Reporting and Disclosure Act of 1959 was not brought about by any abuses found to have flourished under the aegis of the weighted voting system.

We think what we have just said clears the air. We may now leave aside confusing irrelevancies and digressions and address ourselves to the simple, central issue: in the context of Section 101(a)(3)(B), 29 U. S. C., Section 411 (a)(3)(B), do the words "by majority vote of the delegates voting at a regular convention" mean one vote for each delegate?

As we are unable to perceive any other meaning attributable to the phrase, we hold: that each delegate at the 1963 Convention was entitled to one vote, no more, no less, that the resolution as passed was void, as violative of the plain requirements of the Act: and, that the judgments appealed from must be affirmed.

The Act thus construed does not "virtually disenfranchise thousands of appellants' members" as the statute provides an alternative method of increasing dues by referendum, in which case the issue would be determined "by majority vote of the members," rather than "by majority vote of the delegates." Voting by stockholders of corporations is not, we think, an analogous situation. The same is true of methods prescribed by the federal or state constitutions or by legislation for the nomination or election of various public officials. Nor is it of significance that Title IV of the Act apparently permits the election of officers of unions by a weighted vote. The considerations the Congress may well have thought relevant to election of officers on the one hand, and raising dues at regular conventions, on the other, are not the same.

[fol. 191] True it is that the Bill of Rights, so-called, in Section 101(a)(1), 29 U. S. C., Section 411(a)(1), is "subject to reasonable rules and regulations in such organization's constitution and by-laws." And Section 103, 29 U. S. C., Section 413, provides that nothing in Title I, "Bill of Rights of Members of Labor Organizations," shall limit the rights or remedies of members of unions under any

State or Federal law, "or under the constitution and bylaws of any labor organization." But these provisions are of no avail to appellants, for two reasons. In the first place, Section 101(b), the very Section prescribing a "majority vote of the delegates voting at a regular convention" for an increase of dues, states: "Any provision of the constitution and bylaws of any labor organization which is inconsistent with this section shall be of no force and effect." In the second place, no requirement of a weighted vote could possibly be considered "reasonable," in the face of a statutory requirement of one vote for each delegate.

It is surprising that appellants should also rely upon the McClellan Bill and the Barden Bill, each of which specifically allowed weighted voting. S. 1137, 86th Cong. 1st Sess., Section 104(2) (1959); H. R. 4473, 86th Cong. 1st Sess., Section 102(b)(3) (1959). These bills were rejected.

Everyone seems to agree that the Labor-Management Reporting and Disclosure Act was "to insure union democracy," and that the intended beneficiary of the provisions of the Act is the union member. O'Donoghue, The Bill of Rights—Responsibilities of Its Beneficiaries, 48 Geo. L. J. 257 (1959). But the natural inference to be drawn from a reading of the Act, especially the portion relating to increases of dues, initiation fees, and assessments, is that the specific enumeration of methods of proposing and voting for such increases is intended to be exclusive. One need not be steeped in the historical data affecting the uses and abuses of labor organizations to realize that any compli- [fol. 192] cated system of proposing and voting for increases in dues, initiation fees and assessments is subject to manipulation, to the disadvantage of the individual union member. We hold that the simple, unambiguous requirements set forth in Section 101(a)(3)(B) were intended to mean just what they appear on their face to mean, and that in this way the Congress intended to prevent future skulduggery of every possible character and description in the fertile field of increasing dues, initiation fees and assessments, even if no particular abuses in the matter of weighted voting for such increases had been proved.

Other contentions by the respective parties have not been overlooked.

Affirmed.

Judge Marshall dissents and will file an opinion in a few days.

[fol. 193] MARSHALL, Circuit Judge (dissenting) (filed December 23, 1963):

I must respectfully dissent from the opinion of my brothers. Like them, I recognize that a weighted voting system appeared in many representative union constitutions prior to the enactment of the Labor-Management Reporting and Disclosure Act of 1959,[1] and that the statutory provision in question "was not brought about by any abuses found to have flourished under the aegis of that system."[2] My disagreement is only with the conclusion that the words "by majority vote of the delegates voting" were intended and must be construed to invalidate this common and concededly fair method of delegate voting at union conventions, insofar as it is used to approve dues increases.[3]

I think it is fair to say that the majority decision rests principally on the so-called "plain meaning rule," i.e., that the statutory phrase is capable of but one interpretation. My brethren recognize, as noted above, that elimination of the weighted voting system was not consciously put forward as a goal of the Act, whose main thrust was to correct the flagrant abuses of power by some union officials which had been uncovered by extensive Congressional investigations. Nor does any reason readily suggest itself [fol. 194] for barring the weighted ballot system in connection with dues increases voted at union conventions but

[1] 73 Stat. 522, 29 U. S. C. §401 et seq.

[2] See Leiserson, American Trade Union Democracy 122 (1959). "Through a representative body, the typical convention is identified with the union itself as if it were a general meeting of all the members. On roll call votes, the full membership of each local union is voted by its representatives in some conventions. In most, the same plebiscite effect is achieved by the delegates from each local casting a fixed number of votes proportionate to its membership."

[3] Throughout this opinion, the word "weighted" is restricted to the method whereby delegates vote proportionate to the membership of the locals they represent. Nothing herein is to be construed as a blanket approval of all methods of weighted voting.

in no other respect. It is clear that, with regard to election of officers and, indeed, any other action taken at these conventions, the system is perfectly acceptable. Cf. §401(f) of the Act, 29 U. S. C. §481(f). I can find no support for the majority's suggestion that dues increases are a particularly "fertile field" for "skulduggery," to which an especially strict standard should be applied.

We are left then, with the "plain meaning" rule as the only real basis for the majority decision. Conceding that the crucial phrase, taken in isolation, most naturally bears the majority's interpretation of it, I do not believe that any other reading is absolutely barred. The term used is "majority vote of the delegates voting," not "vote of a majority of the delegates voting." It bears the interpretation, perhaps not without some strain, that delegates may have differing voting strength, depending on the size of the locals which they represent. Where there are compelling reasons to give such interpretation, and none to give the more apparent one, it is open to us to do so. The plain meaning rule, after all, "is rather an axiom of experience than a rule of law and does not preclude consideration of persuasive evidence if it exists." *Boston Sand & Gravel Co.* v. *United States*, 278 U. S. 41, 48 (1928) (Holmes, *J.*). Again, it has been said that "words are inexact tools at best and for that reason there is wisely no rule of law forbidding resort to explanatory legislative history no matter how clear the words may appear on 'superficial examination.'" *Harrison* v. *Northern Trust Co.*, 317 U. S. 476, 479 (1943). Of course, the "rule" has an important place as a canon of construction and I do not wish to contest the general proposition that the language actually chosen is the most reliable guide to the legisla- [fol. 195] ture's intention. But it is a myopic view, and one oblivious of precedent, that shuts us off from consideration of the purposes intended to be served by legislation in a case where the "plain meaning" rule leads to incongruous and even unjust results. See, e.g., *United States* v. *American Trucking Assn.*, 310 U. S. 534 (1940); *United States* v. *Dickerson*, 310 U. S. 554 (1940); *United States* v. *N. E. Rosenblum Truck Lines*, 315 U. S. 50 (1942); *N. L. R. B.* v.

Lion Oil Co., 352 U. S. 282 (1957); *J. C. Penney Co.* v. *Commissioner*, 312 U. S. 65 (2 Cir. 1962).

Of the many provisions of the LMRDA, section 101(a)(3) was one of the least controversial. It first appeared in an amendment offered by Senator McClellan on the Senate floor to add a "Bill of Rights" to the labor reform bill which had been reported by the Senate Committee on Labor and Public Welfare (S. 1555, 86th Cong., 1st Sess.). See 105 Daily Cong. Record 5810 (April 22, 1959), reprinted in 2 N. L. R. B. Legislative History of the Labor-Management Reporting Disclosure Act of 1959, 1102 (1959).[4] Senator McClellan's amendment provided that in the case of a national labor organization the rates of dues should not be changed, and no new dues, initiation fees or assessments imposed except by a majority vote of the delegates present at a duly constituted convention. Senator McClellan explaining this part of his amendment, said only that

> In other words, the dues or the initiation fees cannot be increased, as they have been in certain instances. For example, if certain jobs come along, the initiation fees are hiked up. Some of the new members get the new jobs, and the old members who have been members for a long time, get no assignment to work. That has [fol. 196] happened in my State, and it is happening in other States, too. It is not right; it is wrong. 2 *Leg. Hist.* 1104.

There was no further floor discussion of this part of the amendment prior to the vote on it. On April 24, 1959, Senator Kuchel offered an amended "Bill of Rights" title which reworded most of the provisions to eliminate ambiguities and overly broad language in some of them. The paragraph dealing with dues increases was amended to provide three methods of increasing dues: (1) majority vote of the members at a meeting or (2) a referendum through the mails or (3) in the case of a national or international organization, "by majority vote" at a regular or duly constituted special convention. Senator Kuchel of-

[4] Hereinafter cited as *Leg. Hist.*

fered no explanation of the changes in this provision, indicating that it was taken "almost verbatim from that part of the McClellan amendment which was applicable • • •" 2 *Leg. Hist.* 1232. Again, there was no further floor debate until the revised "Bill of Rights" was passed.

The bill then moved to the House. As is well known, three versions of the Labor Reform Bill, H. R. 8342 (the Elliott Bill, reported by the Committee on Education and Labor), H. R. 8400 (the Landrum-Griffin Bill, which was ultimately adopted on the floor) and H. R. 8490 (the Shelley Bill, generally favored by organized labor) were the most important ones considered. The relevant language of all three bills was identical, and was the language finally enacted into law. The principal changes from the Senate version were that only dues increases, rather than all changes in dues, were required to be submitted to membership action, that a referendum vote was specifically authorized for both local and national labor organizations, and that executive boards of national unions were authorized to make interim increases until the next regu- [fol. 197] lar convention of the organization. These changes were apparently made in response to criticisms of the Senate Bill voiced by representatives of organized labor at hearings before the House Committee on Education and Labor.

The purpose of the section was expressed in various ways, but emphasis was always placed on ensuring members the "right to participate in deciding upon the rates of dues" (H. Rep. No. 751, 86th Cong., 1st Sess. 7); or "to control membership and other fees charged by the union" (*id.* at 78); or to "protect against exorbitant rates or arbitrary changes in dues and fees." 2 *Leg. Hist.* 1520 (remarks of Rep. Griffin).

It seems to me clear that Congress intended merely to assure that dues increases could not be imposed by irresponsible or arbitrary union leaders not answerable in any way to the membership at large. It did not set out to dictate to unions a particular method for voting by delegates at national conventions, and, especially, did not have any desire to foreclose national unions from giving more weight to their larger locals on this question. Under

the majority's interpretation of this provision, the only way a national union could do this, and still give even small locals at least one delegate, would often be to increase the number of delegates and the expense of holding conventions, out of all manageable proportions. In the instant case the size of Federation locals varied from 20 (Local 629, Waupaca, Wisc.) to 28,000 (Local 802, New York City), so that a fully proportional system of representation would require some 14,000 delegates in an organization with 280,000 members.

In summary, then, I am most reluctant to employ the "plain meaning" rule here as a means of preventing the use of a perfectly normal and accepted means of voting at union conventions, especially since there is no evidence that Congress felt this method was subject to any abuse [fol. 198] whatsoever. It is noteworthy that none of the Congressmen and Senators who discussed the bill ever adverted to this problem, or indicated in any way that a change in the practice was desirable. The same is true of the many commentators who have exhaustively analyzed the provisions of the Act, from every possible standpoint. The term "majority vote of the delegates voting" is susceptible to a construction which would allow delegates' votes to be weighted in accordance with the strength of the different locals they represent. We ought to accept that construction, and reverse the summary judgment herein.

[fol. 199]

IN UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Present: Hon. Harold R. Medina, Hon. Sterry R. Waterman, Hon. Thurgood Marshall, Circuit Judges.

JULIUS SCHWARTZ, et al., Plaintiffs-Appellees,

v.

ASSOCIATED MUSICIANS OF GREATER NEW YORK LOCAL 802, AMERICAN FEDERATION OF MUSICIANS OF THE UNITED STATES AND CANADA, Defendant-Appellant.

JUDGMENT—December 18, 1963

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

On Consideration Whereof, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed; with costs to the appellees.

A. Daniel Fusaro, Clerk.

[fol. 200] [File endorsement omitted]

[fol. 201]

IN UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Present: Hon. Harold R. Medina, Hon. Sterry R. Waterman, Hon. Thurgood Marshall, Circuit Judges.

EDDIE WITTSTEIN, et al., Plaintiffs-Appellees,

v.

AMERICAN FEDERATION OF MUSICIANS OF UNITED STATES AND CANADA, Defendant-Appellant.

JUDGMENT—December 18, 1963

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

On Consideration Whereof, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed.

A. Daniel Fusaro, Clerk.

[fol. 202] [File endorsement omitted]

[fol. 220] Clerk's Certificate to foregoing transcript (omitted in printing).

[fol. 221]

SUPREME COURT OF THE UNITED STATES

No. 775—October Term, 1963

AMERICAN FEDERATION OF MUSICIANS, etc., et al., Petitioners,

vs.

EDDIE WITTSTEIN, et al.

ORDER ALLOWING CERTIORARI—March 9, 1964

The petition herein for a writ of certiorari to the United States Court of Appeals for the Second Circuit is granted, and the case is placed on the summary calendar.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

The Chief Justice and Mr. Justice Goldberg took no part in the consideration or decision of this petition.

Office-Supreme Court, U.S.
FILED
JAN 20 1964
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. [redacted] 27

AMERICAN FEDERATION OF MUSICIANS OF THE UNITED STATES AND CANADA AND ASSOCIATED MUSICIANS OF GREATER NEW YORK LOCAL 802, *Petitioners,*

v.

EDDIE WITTSTEIN ET AL., *Respondents.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No.

AMERICAN FEDERATION OF MUSICIANS OF THE UNITED STATES AND CANADA AND ASSOCIATED MUSICIANS OF GREATER NEW YORK LOCAL 802, *Petitioners,*

v.

EDDIE WITTSTEIN ET AL., *Respondents.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioners American Federation of Musicians of the United States and Canada (AFL-CIO) and its Local 802, Associated Musicians of Greater New York, pray that a writ of certiorari issue to review the judgments of the United States Court of Appeals for the Second Circuit entered on December 18, 1963 in *Eddie Wittstein, et al.* v. *American Federation of Musicians, etc.* and *Julius Schwartz, et al.* v. *Associated Musicians of Greater New York, Local 802, etc.*

OPINIONS BELOW

The majority and minority opinions of the Court of Appeals for the Second Circuit are not yet reported. They are reprinted in Appendix A, pp. 1a-13a *infra*. The opinion of the District Court for the Southern District of New York is reported at 223 F. Supp. 27. It is reprinted in Appendix B, pp. 16a-32a *infra*.

JURISDICTION

The judgment of the Court of Appeals was entered on December 18, 1963. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Does Section 101 (a)(3)(B) of the Labor-Management Reporting and Disclosure Act of 1959 (29 U.S.C. § 411(a)(3)(B)) forbid an international union from raising membership dues by a convention vote of delegates based upon the number of members they represent?

2. If Section 101 (a)(3)(B) so forbids, does it to that extent violate the First Amendment?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves Section 101 (a)(3)(B) of the Labor-Management Reporting and Disclosure Act of 1959, 73 Stat. 519, *et seq.*, 29 U.S.C. 401 *et seq.* and the First Amendment to the United States Constitution. These are reprinted in pertinent part in Appendix C, pp. 33a-34a *infra*.

STATEMENT OF THE CASE

A. The Factual Background

Petitioner American Federation of Musicians (AFL-CIO) is an international union comprising 675 local unions and a total membership, in June 1963, of approximately 280,000 (R. 46a).[1] Petitioner Local 802 is the largest local affiliate of AFM and has approximately 28,000 members. Many locals have less than 1% of Local 802's membership. (Official Proceedings of the 1963 Convention, Ex. B. to Scola Affidavit, pp. 7-30) (hereafter cited as "Proceedings").

The representation of locals at conventions is governed by Article 5 of the Federation's Constitution.[2]

---

[1] "R." refers to the Appendix to Appellant's Brief in the court below (white-covered book). Ten copies of this Appendix are being filed with this petition. Appellees (respondents here) also filed an appendix but extra copies are not available and no references have been made to it in this Petition. The full record in the Court of Appeals has, of course, been filed with the clerk.

[2] "All Locals of this Federation of one hundred and fifty members or less shall be entitled to one delegate. All Locals shall be entitled to one delegate for each one hundred members or a major fraction thereof, not exceeding three delegates for any on Local, but each Local shall be entitled to one vote for each one hundred or major fraction thereof, but no Local shall cast more than ten votes, and the number each Local is entitled to shall be computed from the last report made on January 1st before the convention by the Local, according to the books of the Treasurer. On questions affecting a change in the laws, each Local may, upon roll call, cast as many votes as it has members, as per book of the Treasurer, A.F. of M. All laws so passed shall be referred to a convention committee consisting of the Executive Board, A.F. of M., and chairmen of all committees, who may sanction or veto same, their action to be final. Roll call shall be demandable and had under this Article on demand of ten delegates or five Locals."

Each local is entitled to one delegate for each 100 members, or major fraction thereof, but not to exceed three delegates for any one local. Upon the request of "ten delegates or five locals" there must be a roll-call vote on questions affecting a change of the constitution or bylaws; in such a vote "each Local may cast as many votes as it has members".

Thus, for example, Local 802, with 28,438 members, or 10% of the Federation's total membership, had two delegates at the June 1963 Convention, and was entitled, on a roll-call vote, to cast 28,438 votes, or 10% of the total eligible vote. Local 46, with 276 members, or .1% of the total membership, had three delegates and, on a roll call vote, was entitled to cast 276 votes or .1% of the total eligible vote.

The June 1963 Convention of the Federation addressed itself primarily to the effort of replacing its historic method of raising its major revenues. That method, a "tax" based on the earnings of traveling members, had been the subject of extensive controversy and litigation.[3] The proposed substitute known as "Recommendation No. 11" (R. 56a-59a), provided, in pertinent part, that effective January 1, 1964:

> "1. The Federation shall not impose dues based upon earnings of members ('taxes'). Such amendment shall apply to the 10% Traveling Surcharge Tax, the 15% Radio and Television Tax and the Theatre Defense Fund Taxes.
>
> "2. (a) Annual Federation Per Capita Dues payable by Locals to the Federation shall be $6.00

[3] See *Cutler* v. *AFM*, 316 F. 2d 546 (CA 2), cert. denied, 375 U.S. 941, December 9, 1963.

(inclusive of the Per Capita contribution for the Official Journal and the Lester Petrillo Fund)."

* * *

"4. Each Local shall maintain Local regular periodic dues at no less than the rates existing on June 1, 1963, plus $6.00 per annum. Such rates may be reduced with the consent of the International Executive Board."

After two voice votes on Recommendation No. 11, the Chairman announced that he could not make a decision, stating that "the ayes and nayes appear to be of equal response" (R. 60a).

A delegate, speaking on behalf of five locals, then requested a roll-call vote (R. 60a), pursuant to Article 5 of the Constitution.

A roll-call vote was thereupon taken with the delegates of each local casting as many votes as the locals had members.[4] Where the delegates from a local were in disagreement, this weighted vote method gave each delegate a proportion of the votes to which the local was entitled.[5] The result of the vote was, yes: 158,068⅔, no: 113,742⅓. (R. 61a). Recommendation No. 11 was thereby adopted.

---

[4] For example, Local No. 1 cast 1,115 votes "yes" (Proceedings, p. 58).

[5] For example, Local No. 29 was entitled to 368 votes; two delegates favored and one opposed the resolution. Thus, the votes were cast yes: 245 1/3, no: 122 2/3 (Proceedings, p. 58).

B. The Proceedings in the Courts Below

1. The District Court

On August 14, 1963 Julius Schwartz and others brought suit to enjoin petitioner Local 802 from enforcing the increase of membership dues pursuant to Recommendation No. 11. (R. 3a-24a.)[6] On August 23, 1963 Eddie Wittstein and others brought suit against petitioner Federation to declare Recommendation No. 11 null and void and to enjoin the Federation from putting it into effect. The complaints alleged, *inter alia*, that the method by which Recommendation No. 11 was adopted violated § 101(a)(3)(B) of the Labor-Management Reporting and Disclosure Act of 1959, (73 Stat. 519 *et seq.*, 29 U.S.C. § 401 *et seq.*, hereafter referred to as "the Act"). On motion of defendants the cases were consolidated.

Defendants moved for summary judgment, filing affidavits in support of the motion; plaintiffs filed affidavits in opposition.

On October 28, 1963 the District Court (Richard H. Levet, J.) filed an Opinion, Findings of Fact and Conclusions of Law (R. pp. 122a-139a), reprinted as Appendix "B", infra. The Court found that there was no genuine issue as to certain facts relating to the enactment of Recommendation No. 11 by roll-call vote (B, pp. 24a-25a, *infra*.) The Court then considered whether this method of raising membership dues was lawful and concluded that it was not: "It is my conclusion that the convention failed to comply with the mandatory provisions of Title 29 U.S.C. § 411(a)(3)(B)(i) [§ 101(a)(3)(B)(i) of the Act] and that as a result I am forced to declare the action increasing dues to be void." (p. 31a, *infra*).

---

[6] The Schwartz complaint contained an additional cause of action which was ultimately dismissed and is not relevant to this petition.

The Court thereupon granted judgment to plaintiffs in both actions "declaring that that portion of Recommendation No. 11 increasing the per capita dues of Federation members was invalidly enacted under 29 U.S.C. § 411(a)(3)(B)(i)", and enjoining the defendants from carrying that provision of Recommendation No. 11 into effect.[7] Judgment was entered in *Wittstein* on October 30, 1963 and in *Schwartz* on November 1, 1963.[8] On the same dates, the respective defendants filed notices of appeal.

2. The Court of Appeals

In view of the urgency of the case, the appeal was expedited in the Court of Appeals, argument being held on November 20, 1963, before Judges Medina, Waterman and Marshall. On December 18, the Court by a 2-1 vote affirmed the judgment of the District Court.

The Court held that the procedure followed was proper and, indeed, required under the union's by-laws. It further agreed with the unions that

> "the weighted voting is to all appearances the most 'democratic' method, in the sense that each member is duly 'represented,' and it is a method of voting widely recognized as fair and proper by a number of unions. Not only are similar provision

[7] Subsequently, the District Court entered an order of clarification which explained that it was enjoining only the collection of dues from the members pursuant to Recommendation No. 11 but was not invalidating the provision that each local must pay $6.00 annually to the Federation for each member of the local because the Act does not deal with payments from local union to internationals.

[8] In the *Schwartz* action the Court certified under Fed. R. Civ. P., 54(b) that final judgment could be entered on this cause of action although no judgment had been entered in the other, unrelated, cause of action.

> to be found, with some variations of detail, in many representative union constitutions or by-laws, but it may fairly be said that the passage of the Labor-Management, Reporting and Disclosure Act of 1959 was not brought about by any abuses found to have flourished under the aegis of the weighted voting system." (Pp. 5a-6a, *infra*).

The Court then stated what it took to be "the simple central issue":

> "in the context of Section 101(a)(3)(B), 29 U.S.C., Section 411(a)(3)(B), do the words 'by majority vote of the delegates voting at a regular convention' mean one vote for each delegate?" (p. 6a, *infra*)

This question was then answered in the affirmative:

> "As we are unable to perceive any other meaning attributable to the phrase, we hold: that each delegate at the 1963 Convention was entitled to one vote, no more, no less; that the resolution as passed was void, as violative of the plain requirements of the Act; and that the judgments appealed from must be affirmed." (id.)

The Court rejected the unions' arguments based on the language of the statute, its policy, analogies to voting in public and corporate elections, other provisions of the statute, and the legislative history. The Court said that the union's other contentions (which prominently included the argument that plaintiffs' construction would render the section unconstitutional) "have not been overlooked," but these were not discussed in the opinion.

On December 23, Judge Marshall filed his dissenting opinion, pp. 9a-13a, *infra*. He disagreed with the conclusion that the words "by majority vote of the

delegates voting" were intended and must be construed to invalidate this common and concededly fair method of delegate voting at union conventions. His own conclusion, based on a thorough discussion of the legislative history, was stated as follows:

> "It seems to me clear that Congress intended merely to assure that dues increases could not be imposed by irresponsible or arbitrary union leaders not answerable in any way to the membership at large. It did not set out to dictate to unions a particular method for voting by delegates at national conventions, and, especially, did not have any desire to foreclose national unions from giving more weight to their larger locals on this question. Under the majority's interpretation of this provision, the only way a national union could do this, and still give even small locals at least one delegate, would often be to increase the number of delegates and the expense of holding conventions, out of all manageable proportions.
>
> "In summary, then, I am most reluctant to employ the 'plain meaning' rule here as a means of preventing the use of a perfectly normal and accepted means of voting at union conventions, especially since there is no evidence that Congress felt this method was subject to any abuse whatsoever. It is noteworthy that none of the Congressmen and Senators who discussed the bill ever adverted to this problem, or indicated in any way that a change in the practice was desirable. The same is true of the many commentators who have exhaustively analyzed the provisions of the Act, from every possible standpoint. The term 'majority vote of the delegates voting' is susceptible to a construction which would allow delegates' votes to be weighed in accordance with the strength of the different locals they represent. We ought to accept that construction, and reverse the summary judgment herein." (P. 13a, *infra*)

REASONS FOR GRANTING THE WRIT

A. The Court of Appeals' Construction Invalidates Traditional and Democratic Practices of Many International Labor Unions

As the Court of Appeals recognized, weighted voting (which it invalidated) "is a method of voting widely recognized as fair and proper by a number of unions * * * [s]imilar provisions are to be found with variations of detail, in many constitutions and by-laws. * * *" (p.6a, *infra*). President George Meany of the AFL-CIO submitted an affidavit, based upon his own knowledge "that a large number of international labor organizations provide in their constitutions or by-laws that voting at conventions of the international union shall be by delegates weighed according to the number of members of the locals." (R. 110a).[9] Dr. Leiserson in *American Trade Union Democracy* (Columbia University Press, 1959) stated:

> "* * * every convention delegate casts not only his own vote, but a share of the voting strength

[9] An informal survey of international constitutions of AFL-CIO affiliates shows that at least 20 international unions provide for weighted voting by delegates as a method for raising dues. These include among others the International Brotherhood of Electrical Workers (AFL-CIO) with over 750,000 members and the United Steelworkers of America (AFL-CIO) with over 850,000 members. The United Auto Workers (AFL-CIO), with over a million members, has a closely related voting system which would likewise be invalidated by the decision below.

Bulletin No. 1239 of the United States Department of Labor summarizes the provisions of the union constitutions dealing with election of officers as follows (p. 15): "Under constitutions which provided for the election of officers by referendum, each eligible union member was to cast his own ballot. Where officers are elected at a convention, a delegate's voting strength is usually scaled to reflect the number of members he represents, although the specific formulas set forth in the constitutions differ considerably * * *"

> of the local union he represents as well. This voting strength varies with the size of the locals, and the total vote of a local union may be divided among its delegates or one of them may cast all its votes." *id.* at p. 130.[10]

The effect of the decision below is to require many international unions, if they are ever to raise dues again, to replace more democratic with less democratic voting procedures. Should they desire to retain the wholesome principle of equal membership representation, they would have to so increase the delegate strength of the larger locals as to make the holding of a convention exorbitantly expensive, if not physically impossible.[11] The millions of union members who are

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[10] Dr. Leiserson also writes (*id.* at p. 122):

> "The national union 'in convention assembled' is in many respects a unique political institution deserving more attention and study than political scientists have given it. Though a representative body, the typical convention is identified with the union itself as if it were a general meeting of all the members. On roll call votes the full membership of each local union is voted by its representatives in some conventions. In most, the same plebiscite effect is achieved by the delegates from each local casting a fixed number of votes proportionate to its membership. Often the elected delegates are instructed by their locals how they shall vote on certain issues.
>
> "• • • Combining within itself the functions of a constitutional assembly, a legislature, and a supreme court, it is also a nominating convention with many of the spectacular features of the quadrennial political conventions that nominate candidates for President and Vice-President of the United States."

[11] As Judge Marshall pointed out in his dissent below: "In the instant case the size of Federation locals varied from 20 (Local 629, Waupaca, Wisc.) to 28,000 (Local 802, New York City), so that a fully proportional system of representation would require some 14,000 delegates in an organization with 280,000 members." (p. 13a, *infra*)

in the larger locals would otherwise be virtually disenfranchised at international conventions.

The Court of Appeals' rigid determination that the only lawful system is one delegate, one vote, would not only invalidate provisions which allow delegates to vote the full *membership* strength of their constituency. It would likewise forbid the practice of a great many internationals to allow the delegates attending to cast the full *delegate* strength where less than the full number to which the local is entitled can come to the convention. Locals would thus be forced to spend more money sending delegates or lose their proportionate weight in the councils of their union. All this in the name of a statute whose avowed purpose is to protect union democracy and the members' interest in union funds!

The foregoing are the direct practical consequences of the decision below. In view of the number of international unions affected and the fact that these unions periodically hold union conventions at which the question of raising dues can arise, an early resolution of this question by this Court is clearly appropriate. Unless this Court acts now, these unions will be required either to 1) abandon salutary democratic procedures by force of a split decision by a single intermediate appellate court, or 2) risk invalidation of any future dues increase and consequent financial embarrassment.

There is also involved in this case a matter of fundamental principle affecting countless citizens who, in a free society, voluntarily form and join organizations. Does the Congress have the power to set aside

a rule of self-government that, in the words of the Court below, is "the most democratic method . . .", which harms no one and has not been found to be the subject of any abuses? That transcendent constitutional issue can be resolved only by this Court.

B. The Court of Appeals' Construction Raises Substantial Questions.

1. The Court of Appeals Has Plainly Misinterpreted Section 101(a)(3)(B)(i)

The refusal of the court below to include the weighted vote of convention delegates as a method permitted by the phrase "a majority vote of the delegates voting" in § 101 (a)(3)(B)(i) involves such a plain misconstruction of Congressional language as to warrant plenary review and reversal by this Court.

Even if it were to be conceded, as it was by the dissenting Judge, that the words of the statute most naturally bear the meaning which the majority found, the task of ascertaining the Congressional intent could not stop there.[12] For the Court's interpretation is contrary to the universally-acknowledged policies of

[12] We think that the language is entirely neutral on the point at issue. The word "vote", which the Court's construction renders superfluous, clearly refers to a delegate vote of the kind provided for under the labor organization's constitution. Moreover, when Congress did intend to specify that each member was to cast one vote only, it used appropriate, specific language to that effect. Section 401(e) provides that in elections by secret ballot of the membership (required for the election of certain union officers), "each member shall be entitled to one vote". Finally, the author of the language, Senator McClellan, could not, as we show below, have intended it to mean what the Court said it means.

the Act, is inconsistent with its other provisions, is irreconcilable with the legislative history, and raises serious constitutional questions which could otherwise be avoided.

Significantly, neither of the lower courts expressed the view that Congress as a matter of deliberate choice outlawed weighted voting as a method of raising dues. Indeed, such a choice would clearly have been in conflict with the purpose of the Act. As Judge Medina said: "Everyone seems to agree that the Labor-Management, Reporting and Disclosure Act was 'to insure union democracy,' and that the intended beneficiary of the provisions of the Act is the union member." Nevertheless, the Court adopted an interpretation which destroys a method which by its own view "is to all appearances the most 'democratic' method in the sense that each member is duly represented".[13]

This Court has held that the principle "one citizen, one vote" is constitutionally required in elections for government officials, *Gray* v. *Sanders*, 372 U.S. 368. It seems inconceivable that Congress would outlaw an

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[13] The Court's only attempt to justify its decision in terms of this Congressional policy was its unexplained surmise that "Congress intended to prevent future skulduggery of every possible character and description in the fertile field of increasing dues, initiation fees and assessments, even if no particular abuses in the matter of weighted voting for such increases had been proved." But the dissenting Judge said: "I can find no support for the majority's suggestion that dues increases are a particularly 'fertile field' for 'skulduggery,' to which an especially strict standard should be applied." And the majority itself conceded that "it may fairly be said that the passage of the Labor-Management, Reporting and Disclosure Act of 1959 was not brought about by any abuses found to have flourished under the aegis of the weighted voting system." P. 6a, *infra*.

attempt by a union to reflect that constitutional principle in its convention voting procedures.

The decision below denies equality of representation to the *members* by ascribing to Congress an inconsistent insistence on equality of *delegates*. Section 101 (a)(1) affirmatively requires that "every member of a labor organization shall have equal rights and privileges within such organization" with respect to many internal political procedures including "to nominate candidates [and] to vote in elections or referendums of the labor organization." A lower value cannot be ascribed to a member's right to be represented equally in an international convention, which is the highest legislative council of the union. By reading Section 101 (a)(3)(B)(i) without considering Section 101 (a)(1), the Court attributes to Congress an inexplicable and bizarre inconsistency of purpose.[14]

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[14] The Court's approach thus differed strikingly from that of the Secretary of Labor who, in executing his responsibility to administer Title IV of the Act, governing union elections, has acted on the assumption that individual provisions can be better understood by considering the statute as a whole. Relying in part on Section 101(a)(1), the Secretary has expressed the view that Congress did not in Title IV specify the system of representation which unions must adopt, but left it to their own constitutions. Department of Labor "*Technical Assistance Aid No. 5*" entitled "*Electing Union Officers*" (revised September 1962), pp. 42-43. The Secretary's views in interpreting a statute committed to his care so shortly after its enactment are entitled to great weight. (*Skidmore* v. *Swift & Co.*, 323 U.S. 134, 139-40). But the Court below thought them of little significance. The Court speculated that Congress might have thought different considerations affect the election of union officers and the raising of dues. But the history of the Act shows that Congress thought that abuses with regard to election of officers were the most serious; see *Mamula* v. *United Steelworkers of America*, 304 F. 2d 108, 109-112 (CA 3).

The legislative history of the statute likewise compels the conclusion that the Court below erred. That history is discussed comprehensively in Judge Marshall's dissenting opinion at pp. 11a-13a *infra*. We think it necessary to add only a few observations.

The provision which became § 101 (a)(3) was not controversial; the three House bills, including the one which was supported by organized labor, contained identical language. President Meany testified at a hearing before a Joint Subcommittee of the House, "section 101 (a)(3) actually permits changes in dues * * * by every method which unions generally employ except action by a general executive board or similar body." *Hearings on Labor-Reform Legislation Before the Joint Subcommittee on Education and Labor of the House Committee on Education and Labor*, 86th Cong., 1st Sess. 1482, 1518 (1959). See R. 111a-112a. The accuracy of his understanding was disputed neither by any member of the Joint Subcommittee nor by Senator McClellan, who responded to Meany's other interpretations on an item-by-item basis.[15] The courts should not attribute to Congress a silent intent to outlaw a historic and concededly democratic practice of a substantial portion of the labor movement. As the Court of Appeals for the Seventh Circuit said in construing this same provision, "On the contrary, we must assume that Congress was aware of the estab-

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[15] 105 Cong. Rec. 10902, 2 *Legislative History of Labor-Management Reporting and Disclosure Act of 1959* (G.P.O., 1959), hereafter cited as *Leg. Hist.*) p. 1294.

That President Meany's testimony was given more than routine consideration is further evidenced by the adoption of his proposed amendment empowering international executive Boards to enact interim dues increases between conventions when so authorized by their International constitutions. See § 101(a)(3)(b)(iii).

lished structure and practices and interpret the statute in the light thereof," *Ranes* v. *Office Employees, Etc.*, 317 F. 2d 915, 917-18. The approach of the court below is diametrically opposed to and in conflict with that of the Seventh Circuit in the *Ranes* case.

The most important evidence in the legislative history on the present question is that separate bills were introduced by Senator McClellan and Congressman Barden, (then Chairman of the House Committee on Education and Labor) which would have *required* that delegates' voting strength be weighted according to the size of their constituency.[16] Section 104 (2) of S. 1137, the McClellan Bill, provided as follows:

> "Voting at Conventions.—All delegates elected or designated by the constituent units of an international labor organization pursuant to the provisions of Section 103(2) to represent such constituent unit at any meeting or convention held by such labor organization shall have a vote in all elections for officers and upon other matters brought before such meeting or convention for action or ratification by vote, *which vote shall be numerically equivalent, or proportionate, to the number of the members of such constituent unit* as disclosed by the roster of members required to

[16] This proposal apparently grew out of certain abuses uncovered by Select Committee on Improper Activities in the Labor-Management Field, of which Senator McClellan was chairman. These abuses included the creation of ghost locals which could cast votes at international conventions, or of dividing a single locals into several, thus giving the original local a disproportionate voice in the international. See S. Rep. No. 1417, 85th Cong., 2d Sess., pp. 198-99, 191. Of course, such practices could flourish only where the voting strength of each delegate was unrelated to the membership of the local.

be furnished under the provisions of section 103 (3)." (I *Leg. Hist.* 278, emphasis supplied).[17]

It is thus apparent that the supporters of the foregoing bills regarded weighted voting in proportion to local membership not as an evil, but as a desirable procedure to assure internal union democracy. Indeed, in referring to this provision of his Bill, Senator McClellan stated that it was designed to insure "Fair and equitable representation of constituent units" (*Analysis*, Par. 4(b), 105 Cong. Rec. 2668, 2 *Leg. Hist.* 1001). Similarly, Representative Barden referred to the voting provision in his bill as a "guarantee" of "democratic processes" (*Summary, Par.* III, 105 Cong. Rec. 2862, 2 *Leg. Hist.* 1468).

It was Senator McClellan who first introduced, as part of his "Bill of Rights" amendment (105 Cong. Rec. 6475-76, 2 *Leg. Hist.* 1102), the provision which ultimately was enacted as § 101(a)(3). Section 101 (a)(4) of his proposal was entitled "Freedom From Arbitrary Financial Exactions". Most relevant was his language describing the required procedure at an international convention, § 101 (a)(4)(A)(ii): "majority vote of the delegates present". The only change from this language to § 101 (a)(3)(B)(i) as finally enacted is that "present" was changed to "voting"—presumably so that abstaining delegates need not be counted as opposed to a dues increase. Otherwise the language which became law is that of Senator McClellan. It simply defies reason to assume that Senator McClellan, who had proposed that the *only* lawful

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[17] A similar provision, in somewhat different language, was contained in § 102(b)(3) of the Barden bill, (H.R. 4473, 1 *Leg. Hist.* 190).

method of convention voting be weighted voting should sponsor an amendment which would make weighted voting unlawful.

Perhaps the most serious single mistake in the reasoning of the majority below was its failure to draw this obvious inference from Senator McClellan's proposal in S. 1137 and his sponsorship of what ultimately became Section 101 (a)(3)(B)(i). The majority said: "It is surprising that appellants should also rely upon the McClellan Bill and the Barden Bill, each of which specifically *allowed* weighted voting. * * * These bills were rejected." (Emphasis added). The Court plainly misunderstood S. 1137, which would not only have *allowed* weighted voting but would have *required* it to the exclusion of all other bases of representation. "These bills were rejected", not because Congress was affirmatively opposed to weighted voting, but because it was unwilling so to restrict unions in formulating voting procedures. The changes made from the Bill of Rights as introduced by Senator McClellan, first in the Kuchel bill and then in the House bills, enlarged the permissible methods of raising dues. By these actions Congress demonstrated that it did not wish to disturb those union procedures which, in Rep. Griffin's words, assured members, "that their dues and initiation fees will not be increased arbitrarily." 105 Cong Rec. 15530, 2 *Leg. Hist.* 1566.

Congressman Griffin added "What rank and file union member will complain because the law guarantees him the right to a democratic voice in the affairs of his union?" (Id.) If this "guarantee" was properly interpreted by the Court below, the answer would have to be "All members of large locals whose vote in their unions councils is diluted by force of law." But we think it clear that the majority's interpretation is

wrong, that Congress had no such intent, and that Section 101 (a)(3)(B)(i) permits the concededly democratic voting method followed by the Federation's convention. As the Seventh Circuit concluded in *Rances* v. *Office Employees*, 317 F.2d 915 at 918: "The protection of the rights of union members is the purpose of 101 (a)(3). Unless the provisions of subsection (B) are meaningless, Congress has said that that purpose is served when union members have representation at the council table where dues structures are changed."

2. The Court of Appeals' Construction Conflicts With the First Amendment

The decision below not only misinterprets § 101 (a)(3)(B)(i), but also creates a serious conflict with the First Amendment. Under that decision union members are forbidden to make decisions regarding their own fiscal affairs by a procedure which in the Court of Appeals' words "is to all appearances the most 'democratic' method, in the sense that each member is duly 'represented' ". Such unprecedented interference with the self-government of union members cannot be squared with the First Amendment, which, it is now settled, protects freedom of association. (*NAACP* v. *Button*, 371 U.S. 415; *Louisiana* v. *NAACP*, 366 U.S. 293; *Shelton* v. *Tucker*, 364 U.S. 479; *Bates* v. *Little Rock*, 361 U.S. 516; *NAACP* v. *Alabama*, 357 U.S. 449; *De Jonge* v. *Oregon*, 299 U.S. 353; *Thomas* v. *Collins*, 323 U.S. 516.)

As Mr. Chief Justice Hughes said for a unanimous court in *Amalgamated Utility Workers* v. *Consolidated Edison Company*, 309 U.S. 261, 265:

> "Neither this provision [Section 7 of the Wagner Act] nor any other provision of the Act can prop-

> erly be said to have 'created' the right of self-organization or of collective bargaining through representatives of the employees' own choosing. In *National Labor Relations Bd.* v. *Jones & L. Steel Corp.*, 301 U.S. 1, 33, 34, we observed that this right is a fundamental one; that employees 'have as clear a right to organize and select their representatives for lawful purposes' as the employer has 'to organize its business and select its own officers and agents'; that discrimination and coercion 'to prevent the free exercise of the right of employees to self-organization and representation' was a proper subject for condemnation by competent legislative authority. We noted that 'long ago' we had stated the reason for labor organizations—that through united action employees might have 'opportunity to deal on an equality with their employer,' referring to what we had said in *American Steel Foundries* v. *Tri-City Central Council*, 257 U.S. 184, 209."

The right to form labor organizations must necessarily encompass the right of the members to determine the form which such organizations will take, and particularly the basis on which the wishes of the membership are to become union law. Even as the religious guarantees of the First Amendment sharply limit governmental interference with the determinations and internal organization of religious bodies (see, *Watson* v. *Jones*, 13 Wall. 679; *Kedroff* v. *St. Nicholas Cathedral*, 344 U.S. 94), so the freedom of association limits government interference with the internal organization of labor unions.

The 1959 Act is undoubtedly the most pervasive regulation of the internal affairs of unions ever known in this country. Hitherto the Congress, state legislatures, and the courts have largely left the responsi-

bility for union government where it belonged—with the members. It was to be anticipated that the abandonment of this policy by Congress would raise serious questions of power, both in terms of our federalism, and, more importantly, in light of the affirmative protection of the First Amendment. Since it has been held that the freedom of association is not absolute,[18] delicate problems of balancing the declared public interest in regulation and the members' constitutionally based freedom from governmental interference will arise. But the decision below raises the constitutional questions in a much less difficult form: As construed by the majority, the statute outlaws long-recognized union procedures for self-government, admittedly without advancing union democracy—the provision's sole avowed purpose. On the one side of the constitutional balance thus to be struck is the right of members of an organization to allocate voting strength with regard to major policy decisions so as to give equal treatment to all members; on the other side is—nothing. The constitutionality of this application of § 101 (a)(3) cannot be sustained on the ground that the section may in other situations serve some legitimate congressional objective. "[E]ven though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved." *Shelton* v. *Tucker*, 364 U.S. 479, 488.[19]

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[18] See, e.g., *Communist Party* v. *Control Board*, 367 U.S. 1, 88-105.

[19] The absence of any identifiable public purpose also removes all basis for federal intervention into an area which hitherto had been committed exclusively to the states, which alone had previously regulated even in part, the affairs of private associations.

Unless freedom of association no longer encompasses the right of employees to self-organization, or union members, unlike other citizens, are to be regarded as mere wards, unable to govern themselves except under the benign tutelage of outside authority, the decision below cannot be reconciled with the First Amendment.

CONCLUSION

The Judgment Below Should Be Summarily Reversed

The substantiality of the question presented is abundantly demonstrated by Judge Marshall's dissent, and the additional considerations advanced in this Petition. Indeed, the error of the Court below on the issue of statutory interpretation is so clear, that we earnestly urge this Court to summarily reverse the judgment below. A comparison of the majority opinion and the dissent would alone justify this course. Whereas the dissenting judge carefully analyzed the legislative history to arrive at his interpretation, the majority, to the extent that it gave consideration to that history, drew inferences which, as we have sought to show, were patently unsound. The majority's failure to grasp the implications of Senator McClellan's proposal of a bill requiring weighted voting, prior to his sponsorship of what became, without relevant

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The asserted basis of the regulation of union affairs in the 1959 Act is a nexus between union democracy in labor unions and interstate commerce. Any regulation which does not promote this objective of the statute is outside any provision of Article I, Section 8, of the Constitution. As this Court stated in *Kinsella* v. *United States ex rel. Singleton*, 361 U.S. 234, 247-49, the "necessary and proper" clause of the Constitution is not a grant of power in addition to the other clauses of Article I, Section 8, but is merely a caveat that these are to be broadly interpreted.

change, the very provision in question here, is particularly significant. The conclusion of the dissenting judge is further reinforced by the by-now well-settled principle, apparently unheeded by the majority, "that a statute should be interpreted, if at all possible, in such a way as to free it from not insubstantial doubts." *Lynch* v. *Overholser*, 369 U.S. 705, 711. Can it seriously be denied that an Act of Congress which forbids an egalitarian distribution of political power within a trade union creates substantial constitutional doubts?

The petition for certiorari should be granted and the judgment reversed.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Nos. 246 and 247—September Term, 1963.

(Argued November 20, 1963. Decided December 18, 1963.)

Docket Nos. 28563 and 28564

EDDIE WITTSTEIN, BEN CUTLER, JULIUS SCHWARTZ, MARTY LEVITT, CLAUDE GARREAU, BERT FISHER, GEORGE AULD, LEO GRECO, HECTOR DERIENZO, MILTON FAROWITZ and MATT GILLESPIE,

Plaintiffs-Appellees,

— against -

AMERICAN FEDERATION OF MUSICIANS OF THE UNITED STATES AND CANADA,

Defendant-Appellant.

JULIUS SCHWARTZ, BUDDY KANE, ROBERT CURTIS, JOHN C. ROSENMERKEL, WILLIAM ARNOLD, FRANCES BARON, LEONARD O. GASKIN, LOUIS V. SCHWARTZ, HERBERT WASSERMAN, JUDITH BREGMAN, SOLOMON KOSARIN and GLEN WILLIAMS,

Plaintiffs-Appellees,

— against —

ASSOCIATED MUSICIANS OF GREATER NEW YORK, LOCAL 802, AMERICAN FEDERATION OF MUSICIANS OF THE UNITED STATES AND CANADA,

Defendant-Appellant.

Before:

MEDINA, WATERMAN and MARSHALL, *Circuit Judges.*

Appeals from judgments of the United States District Court for the Southern District of New York, Richard H. Levet, *Judge.*

American Federation of Musicians of the United States and Canada and Associated Musicians of Greater New York, Local 802, appeal, respectively, from two summary judgments granted in consolidated actions holding invalid the action of the June 1963 Convention of the Federation increasing dues. Opinion below reported at ——F. Supp. ——. Affirmed.

MEDINA, *Circuit Judge*:

As a result of our decision in *Cutler* v. *American Federation of Musicians*, 2 Cir., 1963, 316 F. 2d 546, cert. denied, December 9, 1963, —— U.S. ——, holding invalid the 10 per cent travelling surcharge imposed by certain provisions of the By-laws and Constitution of the Federation, an attempt was made to supply funds deemed necessary to take the place of the travelling surcharge by presenting for adoption at the ensuing Annual Convention of the Federation held in June, 1963, a resolution increasing per capita membership dues. When this resolution was passed these consolidated actions were brought by individual members of the unions to challenge the validity of the dues increase on the ground that it ivolated the provisions of the Labor-Management, Reporting and Disclosure Act of 1959, Section 101(a)(3)(B), 29 U.S.C., Section 411(a)(3)(B). Judge Levet sustained this contention and held the action of the Convention in passing the increase of dues resolution void, on the ground that the Act required that each delegate cast only one vote, whereas the roll call method pursued at the Convention allowed the votes of the delegates to be weighted in such manner as to count as votes by the number of members in the locals represented by the delegates, and not by counting the vote of each delegate as a single vote. His opinion, *Wittstein* v. *American Federation of Musician*, S.D.N.Y., 1963, is reported at —— F. Supp. ——. Numerous other miscellaneous points are raised, especially in the brief of appellees, but, as we agree with Judge Levet on the principal question of law involved, we do not find it necessary to discuss the other points.

The two cases were disposed of by summary judgments for plaintiffs. In *Wittstein, et al.* v. *American Federation of Musicians of the United States and Canada* the judgment is final. In *Schwartz, et al.* v. *Associated Musicians of Greater New York, Local 802, American Federation of Musicians of the United States and Canada*, only the first count of the complaint was dismissed, as other questions than those discussed in this opinion were raised, but Judge Levet made the customary finding and order prescribed by Rule 54(b) of the Federal Rules of Procedure. Thus appeals by the Federation and by Local 802 are properly before us.

The controlling language of the 1959 Act, Section 101 (a)(3)(B), 29 U.S.C., Section 411(a)(3)(B), applicable specifically to "Dues, Initiation Fees, and Assessments" provides that rates of dues and initiation fees payable by union members shall not be increased except

> "(B) in the case of a labor organization, other than a local labor organization or a federation of national or international labor organizations, (i) by majority vote of the delegates voting at a regular convention, or at a special convention of such labor organization held upon not less than thirty days' written notice to the principal office of each local or constituent labor organization entitled to such notice, or (ii) by majority vote of the members in good standing of such labor organization voting in a membership referendum conducted by secret ballot, or (iii) by majority vote of the members of the executive board or similar governing body of such labor organization, pursuant to express authority contained in the constitution and by-laws of such labor organization: *Provided*, That such action on the part of the executive board or similar governing body shall be effective only until the next regular convention of such labor organization."

These provisions apply to the Federation, which is a labor organization other than a local labor organization or a federation of national or international labor organizations within the meaning of the Act, and the Federation is conceded to be a labor organization in an industry affecting commerce as defined in Section 3(i) of the Act, 29 U.S.C., Section 402(i).

Article 5 of the Federation's Constitution contains the basic rules governing "Representation and Delegates," as follows:

> "All Locals of this Federation of one hundred and fifty members or less shall be entitled to one delegate. All Locals shall be entitled to one delegate for each one hundred members or a major fraction thereof, not exceeding three delegates for any one Local, but each Local shall be entitled to one vote for each one hundred or major fraction thereof, but no Local shall cast more than ten votes, and the number each Local is entitled to shall be computed from the last report made on January 1st before the convention by the Local, according to the books of the Treasurer. On questions affecting a change in the laws, each Local may, upon roll call, cast as many votes as it has members, as per book of the Treasurer, A. F. of M. All laws so passed shall be referred to a convention committee consisting of the Executive Board, A. F. of M., and chairmen of all committees, who may sanction or veto same, their action to be final. Roll call shall be demandable and had under this Article on demand of ten delegates or five Locals."

And the By-laws, in Article 28, relating to Convention Proceedings and the order of business at such conventions, prescribe

> "Section 2. For Rules of Order, Robert's Revised Manual shall be the guide unless otherwise provided,

and the manner of voting shall be viva voce, unless otherwise ordered. The vote at elections or the vote on roll call shall be in accordance with Article V of the Constitution."

The procedure followed at the June, 1963 Convention followed this pattern to the letter. We find nothing to support appellees' protestations to the controry. Two voice votes of the delegates were inconclusive, there was a demand by five locals or more for a roll call. At the roll call the votes of the delegates were weighted in such fashion as to record in favor of or against the resolution not the number of delegates but the number of members of the local represented by the delegates. Thus Local 802, represented by two delegates,[1] cast 28,438 votes against the resolution.[2]

As we read the Constitution and the By-laws, the decisive vote was required to be by roll call, on proper demand, and such a demand must be complied with, irrespective of the result of any prior voice or standing vote. Thus, even if the voice vote had been clearly one way or the other, and even if a standing vote thereafter taken had been equally plain for all to see, the roll call, on proper demand, would decide the issue. Otherwise the provisions of the Constitution and By-laws make no sense. Indeed, we have no reason to doubt that a proper demand for a roll call would have to be acceded to, even if made prior to the taking of any voice or standing vote.

Moreover, as appellants claim to be the case, the weighted voting is to all appearances the most "democratic" method, in the sense that each member is duly "represented," and

[1] Local 802 was entitled under the Federation's Constitution to three delegates.

[2] As not affecting the result, in the view we take of the applicable law, we do not discuss the split or duplicate votes cast at the 1963 Convention.

it is a method of voting widely recognized as fair and proper by a number of unions. Not only are similar provisions to be found, with some variations of detail, in many representative union constitutions or by-laws, but it may fairly be said that the passage of the Labor-Management, Reporting and Disclosure Act of 1959 was not brought about by any abuses found to have flourished under the aegis of the weighted voting system.

We think what we have just said clears the air. We may now leave aside confusing irrelevancies and digressions and address ourselves to the simple, central issue: in the context of Section 101(a)(3)(B), 29 U.S.C., Section 411 (a)(3)(B), do the words "by majority vote of the delegates voting at a regular convention" mean one vote for each delegate?

As we are unable to perceive any other meaning attributable to the phrase, we hold: that each delegate at the 1963 Convention was entitled to one vote, no more, no less; that the resolution as passed was void, as violative of the plain requirements of the Act; and that the judgments appealed from must be affirmed.

The Act thus construed does not "virtually disenfranchise thousands of appellants' members" as the satute provides an alternative method of increasing dues by referendum, in which case the issue would be determined "by majority vote of the members," rather than "by majority vote of the delegates." Voting by stockholders of corporations is not, we think, an analogous situation. The same is true of methods prescribed by the federal or state constitutions or by legislation for the nomination or election of various public officials. Nor is it of significance that Title IV of the Act apparently permits the election of officers of unions by a weighted vote. The considerations the Congress may well have thought relevant to election of officers on the one hand, and raising dues at regular conventions, on the other, are not the same.

True it is that the Bill of Rights, so-called, in Section 101(a)(1), 29 U.S.C., Section 411(a)(1), is "subject to reasonable rules and regulations in such organization's constitution and by-laws." And Section 103, 29 U.S.C., Section 413, provides that nothing in Title I, "Bill of Rights of Members of Labor Organizations," shall limit the rights or remedies of members of unions under any State or Federal law, "or under the constitution and bylaws of any labor organization." But these provisions are of no avail to appellants, for two reasons. In the first place, Section 101(b), the very Section prescribing a "majority vote of the delegates voting at a regular convention" for an increase of dues, states: "Any provision of the constitution and bylaws of any labor organization which is inconsistent with this section shall be of no force and effect." In the second place, no requirement of a weighted vote could possibly be considered "reasonable," in the face of a statutory requirement of one vote for each delegate.

It is surprising that appellants should also rely upon the McClellan Bill and the Barden Bill, each of which specifically allowed weighted voting. S. 1137, 86th Cong. 1st Sess., Section 102(2) (1959); H.R. 4473, 86th Cong. 1st Sess., Section 102(b)(3) (1959). These bills were rejected.

Everyone seems to agree that the Labor-Management, Reporting and Disclosure Act was "to insure union democracy," and that the intended beneficiary of the provisions of the Act is the union member. O'Donoghue, The Bill of Rights—Responsibilities of Its Beneficiaries, 48 Geo. L. J. 257 (1959). But the natural inference to be drawn from a reading of the Act, especially the portion relating to increases in dues, initiation fees, and assessments, is that the specific enumeration of methods of proposing and voting for such increases is intended to be exclusive. One need not be steeped in the historical data affecting the uses and abuses of labor organizations to realize that any complicated system of proposing and voting for increases in dues,

initiation fees and assessments is subject to manipulation, to the disadvantage of the individual union member. We hold that the simple, unambiguous requirements set forth in Section 101(a)(3)(B) were intended to mean just what they appear on their face to mean, and that in this way the Congress intended to prevent future skulduggery of every possible character and description in the fertile field of increasing dues, initiation fees and assessments, even if no particular abuses in the matter of weighted voting for such increases had been proved.

Other contentions by the respective parties have not been overlooked.

Affirmed.

Judge Marshall dissents and will file an opinion in a few days.

MARSHALL, *Circuit Judge* (dissenting) (filed December 23, 1963):

I must respectfully dissent from the opinion of my brothers. Like them, I recognize that a weighted voting system appeared in many representative union constitutions prior to the enactment of the Labor-Management Reporting and Disclosure Act of 1959,[1] and that the statutory provision in question "was not brought about by any abuses found to have flourished under the aegis of that system."[2] My disagreement is only with the conclusion that the words "by majority vote of the delegates voting" were intended and must be construed to invalidate this common and concededly fair method of delegate voting at union conventions, insofar as it is used to approve dues increases.[3]

I think it is fair to say that the majority decision rests principally on the so-called "plain meaning rule," i.e., that the statutory phrase is capable of but one interpretation. My brethren recognize, as noted above, that elimination of the weighted voting system was not consciously put forward as a goal of the Act, whose main thrust was to correct the flagrant abuses of power by some union officials which had been uncovered by extensive Congressional

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[1] 73 Stat. 522, 29 U. S. C. § 401 et seq.

[2] See Leiserson, American Trade Union Democracy 122 (1959).

"Through a representative body, the typical convention is identified with the union itself as if it were a general meeting of all the members. On roll call votes, the full membership of each local union is voted by its representatives in some conventions. In most, the same plebiscite effect is achieved by the delegates from each local casting a fixed number of votes proportionate to its membership."

[3] Throughout this opinion, the word "weighted" is restricted to the method whereby delegates vote proportionate to the membership of the locals they represent. Nothing herein is to be construed as a blanket approval of all methods of weighted voting.

investigations. Nor does any reason readily suggest itself for barring the weighted ballot system in connection with dues increases voted at union conventions but in no other respect. It is clear that, with regard to election of officers and, indeed, any other action taken at these conventions, the system is perfectly acceptable. Cf. § 401(f) of the Act, 29 U.S.C. § 481(f). "I can find no support for the majority's suggestion that dues increases are a particularly 'fertile field' for 'skulduggery,' to which an especially strict standard should be applied."

We are left then, with the "plain meaning" rule as the only real basis for the majority decision. Conceding that the crucial phrase, taken in isolation, most naturally bears the majority's interpretation of it, I do not believe that any other reading is absolutely barred. The term used is "majority vote of the delegates voting," not "vote of a majority of the delegates voting." It bears the interpretation, perhaps not without some strain, that delegates may have differing voting strength, depending on the size of the locals which they represent. Where there are compelling reasons to give such interpretation, and none to give the more apparent one, it is open to us to do so. The plain meaning rule, after all, "is rather an axiom of experience than a rule of law and does not preclude consideration of persuasive evidence if it exists." *Boston Sand & Gravel Co.* v. *United States*, 278 U.S. 41, 48 (1928) (Holmes, *J.*). Again, it has been said that "words are inexact tools at best and for that reason there is wisely no rule of law forbidding resort to explanatory legislative history no matter how clear the words may appear on 'superficial examination.'" *Harrison* v. *Northern Trust Co.*, 317 U.S. 476, 479 (1943). Of course, the "rule" has an important place as a canon of construction and I do not wish to contest the general proposition that the language actually chosen is the most reliable guide to the legislature's intention. But it is a myopic view, and one oblivious of precedent, that shuts us off from consideration of the purposes intended to be served by legislation in a case where the "plain meaning" rule leads to incongruous and

even unjust results. See, e.g., *United States* v. *American Trucking Assn.*, 310 U.S. 534 (1940); *United States* v. *Dickerson*, 310 U.S. 554 (1940); *United States*, v. *N. E. Rosenblum Truck Lines*, 315 U.S. 50 (1942); *N. L. R. B.* v. *Lion Oil Co.*, 352 U.S. 282 (1957); *J. C. Penney Co.* v. *Commissioner*, 312 U.S. 65 (2 Cir. 1962).

Of the many provisions of the LMRDA, section 101(a)(3) was one of the least controversial. It first appeared in an amendment offered by Senator McClellan on the Senate floor to add a "Bill of Rights" to the labor reform bill which had been reported by the Senate Committee on Labor and Public Welfare (S. 1555, 86th Cong., 1st Sess.). See 105 Daily Cong. Record 5810 (April 22, 1959), reprinted in 2 N. L. R. B. Legislative History of the Labor-Management Reporting Disclosure Act of 1959, 1102 (1959).[4] Senator McClellan's amendment provided that in the case of a national labor organization the rates of dues should not be changed, and no new dues, initiation fees or assessments imposed except by a majority vote of the delegates present at a duly constituted convention. Senator McClellan explaining this part of his amendment, said only that

> In other words, the dues or the initiation fees cannot be increased, as they have been in certain instances. For example, if certain jobs come along, the initiation fees are hiked up. Some of the new members get the new jobs, and the old members who have been members for a long time, get no assignment to work. That has happened in my State, and it is happening in other States, too. It is not right; it is wrong. 2 *Leg. Hist.* 1104.

There was no further floor discussion of this part of the amendment prior to the vote on it. On April 24, 1959, Senator Kuchel offered an amended "Bill of Rights" title which reworded most of the provisions to eliminate ambiguities and overly broad languages in some of them.

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[4] Hereinafter cited as *Leg. Hist.*

The paragraph dealing with dues increases was amended to provide three methods of increasing dues: (1) majority vote of the members at a meeting or (2) a referendum through the mails or (3) in the case of a national or international organization, "by majority vote" at a regular or duly constituted special convention. Senator Kuchel offered no explanation of the changes in this provisions, indicating that it was taken "almost verbatim from that part of the McClellan amendment which was applicable * * *" 2 *Leg. Hist.* 1232. Again, there was no further floor debate until the revised "Bill of Rights" was passed.

The bill then moved to the House. As is well known, three versions of the Labor Reform Bill, H.R. 8342 (the Elliott Bill, reported by the Committee on Education and Labor), H.R. 8400 (the Landrum-Griffin Bill, which was ultimately adopted on the floor) and H.R. 8490 (the Shelley Bill, generally favored by organized labor) were the most important ones considered. The relevant language of all three bills was identical, and was the language finally enacted into law. The principal changes from the Senate version were that only dues increases, rather than all changes in dues, were required to be submitted to membership action, that a referendum vote was specifically authorized for both local and national labor organizations, and that executive boards of national unions were authorized to make interim increases until the next regular convention of the organization. These changes were apparently made in response to criticisms of the Senate Bill voiced by representatives of organized labor at hearings before the House Committee on Education and Labor.

The purpose of the section was expressed in various ways, but emphasis was always placed on ensuring members the "right to participate in deciding upon the rates of dues" (H. Rep. No. 751, 86th Cong., 1st Sess. 7); or "to control membership and other fees charged by the union" (*id.* at 78); or to "protect against exorbitant rates

or arbitrary changes in dues and fees." 2 *Leg. Hist.* 1520 (remarks of Rep. Griffin).

It seems to me clear that Congress intended merely to assure that dues increases could not be imposed by irresponsible or arbitrary union leaders not answerable in any way to the membership at large. It did not set out to dictate to unions a particular method for voting by delegates at national conventions, and, especially, did not have any desire to foreclose national unions from giving more weight to their larger locals on this question. Under the majority's interpretation of this provision, the only way a national union could do this, and still give even small locals at least one delegate, would often be to increase the number of delegates and the expense of holding conventions, out of all manageable proportions. In the instant case the size of Federation locals varied from 20 (Local 629, Waupaca, Wisc.) to 28,000 (Local 802, New York City), so that a fully proportional system of representation would require some 14,000 delegates in an organization with 280,000 members.

In summary, then, I am most reluctant to employ the "plain meaning" rule here as a means of preventing the use of a perfectly normal and accepted means of voting at union conventions, especially since there is no evidence that Congress felt this method was subject to any abuse whatsoever. It is noteworthly that none of the Congressmen and Senators who discussed the bill ever adverted to this problem, or indicated in any way that a change in the practice was desirable. The same is true of the many commentators who have exhaustively analyzed the provisions of the Act, from every possible standpoint. The term "majority vote of the delegates voting" is susceptible to a construction which would allow delegates' votes to be weighted in accordance with the strength of the different locals they represent. We ought to accept that construction, and reverse the summary judgment herein.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the eighteenth day of December one thousand nine hundred and sixty-three.

Present: HON. HAROLD R. MEDINA,

HON. STERRY R. WATERMAN,

HON. THURGOOD MARSHALL,

Circuit Judges.

EDDIE WITTSTEIN, ET AL., *Plaintiffs-Appellees,*

v.

AMERICAN FEDERATION OF MUSICIANS OF UNITED STATES AND CANADA, *Defendant-Appellant.*

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed.

A. DANIEL FUSARO

Clerk

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the eighteenth day of December one thousand nine hundred and sixty-three.

Present: Hon. Harold R. Medina,

Hon. Sterry R. Waterman,

Hon. Thurgood Marshall,

Circuit Judges.

Julius Schwartz, et al., *Plaintiffs-Appellees,*

v.

Associated Musicians of Greater New York, Local 802, American Federation of Musicians of United States and Canada, *Defendant-Appellant.*

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

On Consideration Whereof, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed; with costs to the appellees.

A. Daniel Fusaro
Clerk

APPENDIX B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

OPINION

63 Civ. 2548

EDDIE WITTSTEIN, BEN CUTLER, JULIUS SCHWARTZ, MARTY LEVITT, CLAUDE GARREAU, BERT FISHER, GEORGE AULD, LEO GRECO, HECTOR DERIENZO, MILTON FAROWITZ and MATT GILLESPIE,

Plaintiffs,

against

AMERICAN FEDERATION OF MUSICIANS OF THE UNITED STATES AND CANADA,

Defendant.

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63 Civ. 2442

JULIUS SCHWARTZ, BUDDY KANE, ROBERT CURTIS, JOHN C. ROSENMERKEL, WILLIAM ARNOLD, FRANCES BARON, LEONARD O. GASKIN, LOUIS V. SCHWARTZ, HERBERT WASSERMAN, JUDITH BREGMAN, SOLOMON KOSARIN and GLEN WILLIAMS,

Plaintiffs,

against

ASSOCIATED MUSICIANS OF GREATER NEW YORK, LOCAL 802, AMERICAN FEDERATION OF MUSICIANS OF THE UNITED STATES AND CANADA,

Defendants.

LEVET, D. J.

These consolidated actions are brought by members of the defendant unions challenging certain recent fiscal enactments of both the parent Federation and its Local 802. The complaint in *Wittstein* challenges the procedure at the Fed-

eration's recent annual convention by which a resolution was enacted, purporting to abolish the so-called 10% traveling surcharge tax and substituting therefor an increase in the per capita dues of members of the Federation. The complaint in *Schwartz* is framed in two counts, the second of which is substantially identical to the cause of action asserted in the *Wittstein* complaint. This opinion is expressly directed to govern the disposition of the *Wittstein* complaint and the second count of the *Schwartz* complaint. The first count in *Schwartz* challenges a provision of Local 802's By-Laws which, for the present purposes, is sufficiently unrelated to the cause asserted in the *Wittstein* complaint to be the subject of a separate opinion.

The complaints challenge the procedure by which the resolution was adopted as violative of both the Labor-Management Reporting and Disclosure Act of 1959, 73 Stat. 522, 29 USC § 401 *et seq.*, and the defendant Federation's own Constitution and By-Laws. A declaratory judgment is sought seeking to enjoin the defendant Federation from carrying into effect the resolution on its effective date of January 1, 1964. The Federation has moved for summary judgment.

In order to place the action of the convention in its proper reference, it is necessary to briefly review the legal history of the Federation's 10% traveling surcharge. Article 15 of the Federation's By-Laws requires that Federation members who perform a "miscellaneous out-of-town engagement" be paid, but not to actually receive, an amount equal to 10% of the minimum wage established by the local in whose jurisdiction the engagement takes place. This additional amount is known as the "traveling surcharge." The orchestra leader does not actually turn over the additional 10% to his musicians (sidemen) because Federation By-Laws provide that the local in whose jurisdiction such engagement is performed must collect the traveling surcharge from the orchestra leader and transmit the amount to the Federation. Should the Local fail to

collect the surcharge from the leader, the leader is required to transmit the surcharge directly to the Federation. In a prior action brought by the plaintiff Cutler, the collection of the 10% traveling surcharge from Cutler, when engaged as an employer in the single engagement field, was held to be violative of Section 302 of the Taft-Hartley Act, 29 USC § 186. *Cutler* v. *American Fed. of Musicians*. 211 F. Supp. 433 (S.D.N.Y. 1962), aff'd 316 F. 2d 546 (2 Cir. 1963), petition for certiorari filed, 32 U. S. L. Week 3103 (U.S. Sept. 16, 1963) (No. 473). At the convention, the officers of the Federation sought to abolish the 10% traveling surcharge and substitute therefor an increase in the per capita dues of its 282,000 members.

STATUTES INVOLVED

The pertinent portion of the Act involved is as follows:

"SUBCHAPTER II.—BILL OF RIGHTS OF MEMBERS OF LABOR ORGANIZATIONS

"§ 411. Bill of rights; constitution and bylaws of labor organizations

"• • •

"(3) Dues, initiation fees, and assessments.—Except in the case of a federation of national or international labor organizations, the rates of dues and initiation fees payable by members of any labor organization in effect on September 14, 1959 shall not be increased, and no general or special assessment shall be levied upon such members, except—

"• • •

"(B) in the case of a labor organization, other than a local labor organization or a federation of national or international labor organizations (i) by majority vote of the delegates voting at a regular convention, or at a special convention of such labor organization held upon not less than thirty days'

written notice to the principal office of each local or constituent labor organization entitled to such notice, or (ii) by majority vote of the members in good standing of such labor organization voting in a membership referendum conducted by secret ballot, or (iii) by majority vote of the members of the executive board or similar governing body of such labor organization, pursuant to express authority contained in the constitution and bylaws of such labor organization: *Provided*, That such action on the part of the executive board or similar governing body shall be effective only until the next regular convention of such labor organization."

The defendant Federation is conceded to be a labor organization in an industry affecting commerce as defined in 29 USC § 402(i) and is a labor organization other than a local labor organization or a federation of national or international labor organizations within the meaning of 29 USC § 411(a)(3)(B). See *Cutler* v. *American Fed. of Musicians, supra.*

The relevant article of Federation's Constitution is Article 5 and of the Federation's By-Laws, Article 28. Article 5 is as follows:

"ARTICLE 5—REPRESENTATION AND DELEGATES

"All Locals of this Federation of one hundred and fifth members or less shall be entitled to one delegate. All Locals shall be entitled to one delegate for each one hundred members or a major fraction thereof, not exceeding three delegates for any one Local, but each Local shall be entitled to one vote for each one hundred or major fraction thereof, but no Local shall cast more than ten votes, and the number each Local is entitled to shall be computed from the last report made on January 1st before the convention by the Local, according to the books of the

Treasurer. On questions affecting a change in the laws, each Local may, upon roll call, cast as many votes as it has members, as per book of the Treasurer, A. F. of M. All laws so passed shall be referred to a convention committee consisting of the Executive Board, A. F. of M., and chairmen of all committees, who may sanction or veto same, their action to be final. Roll call shall be demandable and had under this Article on demand of ten delegates or five Locals."

Article 28 of Federation's By-Laws in the pertinent parts are as follows:

"ARTICLE 28—CONVENTION PROCEEDINGS—THE ORDER OF BUSINESS SHALL BE:

"SECTION 1. Appointment of Credentials Committee by the President.
Report of Committee on Credentials.
Standing introduction of Delegates attending Convention for the first time.
Appointment of other committees.
Reading of rough minutes of previous session.
Report of officers.
Communications and bills.
Reports of committees.
Unfinished business.
New business.
Nomination and election of officers.
Installation of officers.
Reading of rough minutes.
Adjournment.

"SECTION 2. For Rules of Order, Robert's Revised Manual shall be the guide unless otherwise provided and the manner of voting shall be *viva voce*, unless otherwise ordered. The vote at elections or the vote on roll call shall be in accordance with Article V of the Constitution.

"SECTION 3. The recommendations made in the official report of the President, Secretary or Treasurer relative to any new law or to any advisable changes in existing laws shall be immediately referred to the Law Committee and shall not thereafter be considered in connection with the report of such officer.

"SECTION 4. Delegates or Locals desiring to introduce in the Convention any resolution or measure must forward same written and in duplicate to the International Secretary, not later than fifteen (15) days before the day set for the first session of the Convention.

"A. All such resolutions or measures shall be printed and distributed to the delegates at said first session.

"B. In addition, delegates may introduce resolutions until thirty (30) minutes after the closing morning session of the second day of the Convention by presenting same to the Chairman.

"C. All resolutions or measures shall be numbered consecutively and printed in compact pamphlet form.

"SECTION 5. At the annual Convention the President shall appoint the following committees: Finance, Measures and Benefits, Good and Welfare, Organization and Legislation, International Musician, President's Report, Secretary's Report, Location and such other committees as the Convention may direct. As soon as practicable after receiving the list of delegates, the President shall appoint from that list the Credentials Committee and the Law Committee, and from the members of said Law Committee a subcommittee of five to be known as the Appeals Committee.

"SECTION 6. • • •

"SECTION 7. The Committee on Credentials shall examine and report on the credentials of delegates. The chairman of the committee shall take charge of all documents appertaining to the duties of said committee, investigate and report upon the credentials of the delegates immediately after appointment, and the report of said committee shall be disposed of before any other business is transacted.

"A. When the Secretary receives credentials from the locals he shall, when acknowledging receipt of the same to the individual delegates, enclose a sticker which the delegate may attach to his luggage on which is inscribed words encouraging the use of live music.

"SECTION 8. The Committee on Finance shall annually inspect and investigate the financial affairs of the American Federation of Musicians and accounts of the Secretary and Treasurer of the Federation, as well as the books and accounts of all who may be entrusted with the receipt or expenditure of Federation funds, and shall make a full report in writing of its findings to the Convention of the Federation at which it was appointed.

"SECTION 9. All other committees created by the convention shall perform such duties as indicated by their title, and all resolutions introduced shall be referred by the President to the Committee he deems appropirate to receive and act upon such resolution.

"SECTION 10. Printed copies of the annual reports of the President, Secretary, Treasurer, Auditor and any resolutions to be submitted to the Convention by the International Executive Board, if possible, shall be mailed to the accredited delegates to the Convention of the Federation not earlier than three weeks

and not later than two weeks preceding the opening session of the Convention.

"* * * *

"SECTION 21. No alterations or amendments to the Constitution or By-Laws (except it is otherwise provided in the By-Laws or ordered by a Convention) shall be made unless proposed in writing, and said alterations or amendments must receive a majority vote of the delegates present to become a law, unless otherwise provided.

"SECTION 22. All amendments and additions to the laws passed by the Federation shall go into effect the fifteenth day of September succeeding the Convention which enacts them. Exempt therefrom are amendments and additions for the enforcement of which the Convention has designated another date than the fifteenth day of September."

As appears in 29 USC § 411(a)(3), "the rates of dues and initiation fees payable by members of any labor organization in effect on September 14, 1959 shall not be increased, and no general or special assessment shall be levied upon such members except,—* * *" as provided by said Section 411(a)(3). These methods governing in the case of a labor organization such as defendant Federation are specifically set forth as follows:

"* * * (i) by majority vote of the delegates voting at a regular convention, or at a special convention of such labor organization held upon not less than thirty days' written notice to the principal office of each local or constituent labor organization entitled to such notice, or (ii) by majority vote of the members in good standing of such labor organization voting in a membership referendum conducted by secret ballot, or (iii) by majority vote of the members of the executive board or similar governing body of such labor organization, pursuant to express

> authority contained in the constitution and byalws of such labor organization: *Provided*, That such action on the part of the executive board or similar governing body shall be effective only until the next regular convention of such labor organization."

THE CONVENTION'S VOTE

There are no genuine issues as to any material facts concerning the following: At an evening session of the convention commencing at 8:15 P.M. on June 12, 1963, the Joint Committee on Law and Finance submitted its report through Chairman Davis (Law) and Chairman Chanson (Finance) recommending passage of Recommendation No. 11 which *inter alia* abolished the 10% traveling surcharge and substituted therefor an increase in the per capita dues of Federation members. After some discussion and the transaction of other business, Recommendation No. 11 was called for vote. Two voice votes were had, after each of which the Chair was unable to determine whether the "ayes" or "nayes" predominated, stating: "The ayes and nayes appear to be of equal response." No further attempt was made to ascertain how the delegates voted either by a show of hands or by standing. Thereafter, Delegate Snider, alleging to be speaking in behalf of five locals, demanded a roll call vote in accordance with Article 5 of the Federation's Constitution, which provides:

> "On questions affecting a change in the laws, each Local may, upon roll call, cast as many votes as it has members as per book of the Treasurer, A. F. of M. * * * Roll call shall be demandable and had under this Article on demand of ten delegates or five Locals."

The Chair then stated: "* * * The roll call vote has been asked for. It's mandatory under the law. * * *" Delegate Tomei then inquired what procedure was to be

followed if "the delegates of the local are divided on the question." The Chair responded:

> "I'm advised, Borther Tomei, that on a split vote each would vote the number of the divisional. You understand, delegates, when you vote in a roll call vote you vote the total membership of your local. You have to divide up the membership of your local." (Scola aff. Oct. 9, 1963, Ex. A, p. 4)

In response to a request to explain what a roll call vote is, the Chair answered:

> "A roll call vote, ladies and gentlemen, is a vote of the total membership of a local. For example, the first local would be Number 1. Local number—the local One representative would rise to the microphone and say, 'Cincinnati votes as follows.' That would be recorded here. We go through the entire list of locals. That's the only way we can do it and we are required to do it under the law." (*ibid.*)

Again, prior to the vote, the Chair explained:

> "• • • If a Local has a thousand members and if one person speaks for that local, having assured this delegation that this (unintelligible words)—he stands up and votes. He names that (unintelligible word) local and the number." (Scola aff., id., p. 7)

Later, Secretary Ballard stated:

> "• • • The roll call vote allows the local to vote the membership of the entire local—the membership on which they pay per capita (unintelligible words). That means that Local Number 1 will vote 1,115 votes and so on down through the entire list." (Scola aff., id., p. 9)

The roll call vote was taken, which resulted in 158,068⅔ votes being cast in favor of Resolution No. 11, and 113,742⅓ votes in opposition. The Chair announced the vote and the session was adjourned at 2:30 A.M.

There are at least 12,381 members of the Federation who are members of more than one Local. They are classified as follows:

	Individual Members	Number of Different Locals to Which Members Belong	Duplicate Membership Voting Strength
	11,145	2	22,290
	1,074	3	3,222
	152	4	608
	6	5	30
	4	6	24
TOTALS	12,381		26,174

The defendant relies solely on the computed recorded vote as allocated to the respective Locals on a membership basis and on nothing else. (SM 119, Oct. 1, 1963)

THE ISSUE

The issue, therefore, is whether or not the procedure in acting on this resolution increasing the dues complied with Section 101(a)(3)(B)(i) of the Act, 29 U.S.C. § 411(a)(3)(B)(i). There is, of course, no contention that a referendum was taken, subsection (a)(3)(B)(ii), nor is there any contention that the majority vote of the members of the Executive Committee was taken pursuant to express authority to increase dues contained in the Constitution and By-Laws of such labor organization, subsection (a)(3)(B)(iii). The defendant contends that the vote as above mentioned and as set forth on pages 56-58 of the Official Proceedings complies with the statute (i.e., a passage "by a majority of the delegates voting at a regular convention"); the plaintiffs allege that it does not.

Non-Compliance with the Act

Purposes of the Act

One of the purposes of the Labor-Management Reporting and Disclosure Act of 1959 and particularly the so-called "Bill of Rights" (29 USC §§ 411-415) was "to insure union democracy." (Senate Report No. 187, 1959, U.S. Code Cong. & Ad. News, 2318.) In the House Report No. 741 one of the purposes stated was to "Require democratic procedures and safeguards within unions, designed to protect basic rights of union members." (1959 U. S. Code Cong. & Ad. News, 2424.) The Senate Report pointed out that effective measures to guarantee internal union democracy cannot be applied to all unions without the coercive powers of government (p. 2322); that "the financial conduct of labor unions and their officers is a proper concern of the Federal Government" and that the rules governing the conduct of the union's business such as dues and assessments payable by the members should be known to all members (p. 2324). It is obvious that the "intended beneficiary of the Labor-Management Reporting and Disclosure Act of 1959 is the union member." (O'Donoghue, The Bill of Rights—Responsibilities of Its Beneficiaries, 48 Geo. L. J. 257 (1959).)

Speaking of the above-mentioned House Committee Report No. 741, Freeman, District Judge, in *Horn* v. *Amalgamated Ass'n of Street Employees*, 194 F. Supp. 560, 561 (E. D. Mich. 1961) wrote:

> "This House Committee Report clearly shows that the reporting committee was concerned about instances of lack of 'internal union democracy' and proposed that effective measures for the protection of 'basic rights' could be applied only through powers of the Government. It is evident that the Bill of Rights of the Labor-Management Reporting and Disclosure Act of 1959 was the response of Congress to

> this concern in which the basic rights to be protected as *specifically set out.* • • •"

In an opinion concerning a resolution of a local union to increase dues, Van Dusen, D. J., wrote:

> "The purpose of the Labor-Management Reporting and Disclosure Act (29 U.S.C.A. § 401ff.) is to assure that 'labor organizations, employers, and their officials adhere to the highest standards of responsibility and ethical conduct in administering the affairs of their organizations, particularly as they affect labor-management relations.' 29 U. S. C. A. § 402(a). • • • Brooks v. Local 30, United Slate Workers, 187 F. Supp. 365, 367 (E. D. Pa. 1960).

In *Nelson v. Johnson*, 212 F. Supp. 233, 248 (D. Minn. 1962), particularly involving the fiduciary duties of union officials, Larson, District Judge, in commenting on the purposes of the Act, among other things said:

> "• • • There can, in short, be little doubt that Congress meant to lay its hands upon irregular internal affairs. See e.g., 105 Cong. Rec. 5489 (daily ed. April 16, 1959) (remarks of Senator Ervin); 45 Va. L. Rev. 203-206 (1959) (remarks of Senator Kennedy); see generally Cox, Internal Affairs of Labor Unions Under the Labor Reform Act of 1959, 58 Mich. L. Rev. 819 (1960). • • •"

The Congressional declaration of findings, purposes and policy contained in Title 29 USC § 401 indicates the intent of Congress to require labor organizations and their officials to adhere to the highest standards of responsibility and ethical conduct in administering the affairs of their organization. To assist in the effectuation of this purpose, Congress was not content to pronounce general

platitudes but, instead, at least as to increased dues, provided explicit and exclusive methods by which such increases might be authorized. Defendant Federation claims that it produced an equivalent or even a superior or more democratic method, but that, even if true, is not determinative of the validity of the process observed.

In like fashion counsel may well argue that a national direct primary of all party voters might be a more democratic method of selecting a Presidential nominee that the convention method and that a direct poll of all voters would be a more democratic method of Presidential election than the present electoral college system. However, it is not the prescribed method and I believe that there is no doctrine of "equivalents" applicable here. As far as democracy is concerned, the second method, that is, membership referendum by secret ballot, is obviously more democratic than the process actually used.

Although proponents of the bill and others recognized the desirability of minimum interference by government in the internal affairs of the union, the fact is that a number of the provisions of the "Bill of Rights" are "express statutory restrictions and requirements which supersede and invalidate all existing contrary provisions in union-governing laws and must be applied to the form prescribed by the law whether or not a majority of the union membership so desires." Hickey, The Bill of Rights of Union Members, 48 Geo. L. J. 226 (1959). As Mr. Hickey points out, "[b]oth the Senate and the House furthered the intrusion of internal union affairs by incorporating the bill-of-rights provision" (id. at 230) and the third method of increasing dues (Title 29 USC § 411(a)(3)(B)(iii)) was inserted by way of amendment to eliminate the necessity of the other more expensive requirements of special conventions and national referenda. (id. at 242)

Title 29 USC § 411(b) provides: "Any provision of the constitution and by laws of any labor organization which

is inconsistent with the provisions of this section shall be of no force and effect." "When one becomes a union member, he agrees to be governed by the union constitution, by-laws and rules *not inconsistent with rights and procedures established by the Act*" (Emphasis inserted). *Cleveland Orchestra Comm.* v. *Cleveland Fed. of Musicians*, 303 F. 2d 229, 230 (6 Cir. 1962).

The pertinent provision of the Act requiring "a majority vote of the delegates voting at a regular convention" is clearly mandatory. The Act definitely limits the manner of action by stating that the rate of dues and initiation fees, etc. shall not be increased *except* by the methods specified.

As enunciated by La Buy, District Judge:

> "* * * A statute which directs performance of a certain thing in a particular manner, bears the implication that the action taken shall not be carried out otherwise than as directed nor by a different person. As was said in Botany Worsted Mills v. United States, 278 U.S. 282, 289, 49 S. Ct. 129, 132, 73 L. Ed. 379: 'When a statute limits a thing to be done in a particular mode, it includes the negative of any other mode. Raleigh, etc., R.R. Co. v. Reid, 13 Wall. 269, 270, 20 L. Ed. 570; Scott v. Ford, 52 Or. 288, 296, 97 P. 99.'" Toledo, P. & W. R.R. v. Stover, 60 F. Supp. 587, 593 (S. D. Ill. 1945).

In construing the Act, the court should first look to a plain-meaning of words as they have been actually enacted by Congress. *Hughes* v. *Local 11, International Ass'n of Bridge Workers*, 287 F. 2d 810, 818 (3 Cir.), cert. denied 368 U.S. 829 (1961).

Ranes v. *Office Employees Union*, 317 F. 2d 915 (7 Cir. 1963) has no bearing on the issue here. It held merely that a valid passage by an international union of a resolution

increasing the dues of all members (i.e., including those of all Local members) did not require action by the Local union under Section 101(a)(3)(A) of the Act, 29 USCA § 411(a)(3)(A).

It is my conclusion that the convention failed to comply with the mandatory provisions of Ttitle 29 USC § 411(a)(3)(B)(i) and that as a result I am forced to declare the action taken increasing dues to be void. Consequently, there is no necessity of determining the alleged violations of the Constitution or By-Laws of the Federation. It is thus evident that the motion of defendants for summary judgment must be denied.

Although the plaintiffs made no cross-motion for summary judgment, the court has authority to grant summary judgment for plaintiffs. *Local 33, Int. Hod Carriers* v. *Mason Tenders Council*, 291 F. 2d 496 (2 Cir. 1961); *Bell* v. *Waterfront Commission of New York*, 183 F. Supp. 175 (S. D. N. Y. 1960), aff'd 279 F. 2d 853 (2 Cir. 1960); *Dickhoff* v. *Shaughnessy*, 142 F. Supp. 535 (S. D. N. Y. 1956); *Hennessey* v. *Federal Security Administrator*, 88 F. Supp. 664 (D. Conn. 1949); 6 Moore, Federal Practice ¶ 56.12 (2 ed. 1953).

Consequently, summary judgment for plaintiffs is granted to the following extent:

(1) A declaratory judgment declaring that that portion of Recommendation No. 11 increasing the per capita dues of Federation members was invalidly enacted under 29 USC § 411(a)(3)(B)(i);

(2) The defendants Federation and Local 802 are permanently enjoined from carrying into effect the provisions of Recommendation No. 11 increasing the per capita dues of Federation members.

The first count in *Schwartz* challenges a provision of Local 802's By-Laws which, for the present purposes, as

heretofore stated, is sufficiently unrelated to the cause asserted in the complaint herein to permit the entry of final judgment with respect to the *Wittstein* action and the second count in the *Schwartz* action. Accordingly, I expressly direct the entry of a final decree and judgment with respect to *Wittstein* complaint and the second cause of action in *Schwartz*. There is no just reason for delay. All the facts pertinent to the decision on the Federation's actions have been adduced. There is, accordingly, no just reason why final judgment should not be entered. See Fed. R. Civ. P. 54(b); *Backus Plywood Corp.* v. *Commercial Decal, Inc.*, 317 F. 2d 339 (2 Cir. 1963), cert. denied, 32 U. S. L. Week 3153 (U. S. Oct. 22, 1963).

Settle order and judgment with costs against the Federation within ten (10) days from the date hereof on two (2) days notice.

Dated: New York, N. Y.
October 28, 1963.

RICHARD H. LEVET
United States District Judge

APPENDIX C

Statutory and Constitutional Provisions Involved

United States Constitution:

Amendment I:

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

Labor-Management Reporting and Disclosure Act of 1959, 73 Stat. 519 *et seq.*, 29 U.S.C. § 401 *et seq.*:

TITLE I:

Sec. 101(a)(1), 29 U.S.C. § 411(a)(1):

"*Equal Rights.*—Every member of a labor organization shall have equal rights and privileges within such organization to nominate candidates, to vote in elections or referendums of the labor organization, to attend membership meetings, and to participate in the deliberations and voting upon the business of such meetings, subject to reasonable rules and regulations in such organization's constitution and bylaws."

Sec. 101(a)(3), 29 U.S.C. § 411(a)(3):

"*Dues, Initiation Fees, and Assessments.*—Except in the case of a federation of national or international labor organizations, the rates of dues and initiation fees payable by members of any labor organization in effect on the date of enactment of this Act shall not be increased, and no general or special assessment shall be levied upon such members, except—

"(A) • • •

"(B) in the case of a labor organization, other than a local labor organization or a federation of national or international labor organizations, (i) by majority vote of the delegates voting at a regular convention, or at a special convention of such labor organization held upon not less than thirty days' written notice to the principal office of each local or constituent labor organization entitled to such notice, or (ii) by majority vote of the members in good standing of such labor organization voting in a membership referendum conducted by secret ballot, or (iii) by majority vote of the members of the executive board or similar governing body of such labor organization, pursuant to express authority contained in the constitution and bylaws of such labor organization: *Provided*, That such action on the part of the executive board or similar governing body shall be effective only until the next regular convention of such labor organization."

TITLE IV:

Sec. 401(e), 29 U.S.C. § 481(e): "In any election required by this section which is to be held by secret ballot • • • [e]ach member in good standing shall be entitled to one vote. • • • The election shall be conducted in accordance with the constitution and bylaws of such organization insofar as they are not inconsistent with the provisions of this title."

Sec. 401(f), 29 U.S.C. § 481(f): "When officers are chosen by a convention of delegates elected by secret ballot, the convention shall be conducted in accordance with the constitution and bylaws of the labor organization insofar as they are not inconsistent with the provisions of this title. The officials designated in the constitution and bylaws or the secretary, if no other is designated, shall preserve for one year the credentials of the delegates and all minutes and other records of the convention pertaining to the election of officers."

IN THE

Supreme Court of the United States

October Term, 1963

No. 775

AMERICAN FEDERATION OF MUSICIANS OF THE UNITED STATES AND CANADA, et al.,

Petitioners

v.

EDDIE WITTSTEIN, et al.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR INDUSTRIAL UNION DEPARTMENT, AFL-CIO, AS AMICUS CURIAE

The Industrial Union Department, AFL-CIO, files this brief *amicus curiae* in support of the petition for certiorari, in accordance with Rule 42 of the Rules of this Court. The consent of the attorneys for all parties has been obtained.

STATEMENT OF INTEREST

The Industrial Union Department (IUD), as its name implies, is that department of the American Federation of Labor and Congress of Industrial Organizations which represents unions organized wholly or partially on an industrial basis. Some 59 unions, with approximately 6 million mem-

dues increase upset in court as the one in this case was. No union can afford that risk.[2]

Therefore, unless the decision below is promptly reversed, most unions will be compelled to accept it as law and amend their constitutions accordingly. But this course presents equally difficult problems. Is the appropriate solution simply to amend the system of voting on dues increases, otherwise leaving the existing system of convention voting intact? If this approach is taken, a highly incongruous situation is created, in which all other convention action is taken by a system of representative voting, while dues increases are passed upon by the distinctly unrepresentative system of one vote per delegate. In a union like the American Federation of Musicians, where locals vary tremendously in size but are permitted no more than 3 delegates, such a system is so highly arbitrary that it probably could not get sufficient support to be adopted. And in any event, this Court should surely not allow a decision to stand unreviewed which is as questionable as this one is, and which will force many unions to adopt a highly undemocratic system of voting on dues matters.

The alternative way for a union to comply with the decision below is to revise the entire structure of its convention, by providing for a representative number of delegates from each local union who would cast only one

[2] The risk would be especially great for the substantial group of unions whose constitutions run from convention to convention. These unions adopt an entire new constitution at each convention. Suppose such a union, by its system of weighed voting, adopts a new constitution calling for higher dues than existed under the preceding one. If a court were to set that action aside as an unlawful dues *increase*, it could be argued that not only the increase but the entire dues provision of the constitution might thereby be nullified. Since the pre-existing provision expired with the old constitution, the argument could be made that the union in such a situation has no valid dues provision at all.

vote each on all matters, including dues increases. This approach also presents practical problems. In many unions, locals vary greatly in size. Thus, the larger locals would have to send a veritable army of delegates in order to be fairly represented. This creates a tremendous financial burden for the locals, as well as a physical problem for the convention itself. These practical considerations would in many cases make this approach simply infeasible.

The above problems, we wish to emphasize, are immediately presented by the decision below whether or not the union anticipates an immediate need for a dues increase. In order to put itself in a position to increase dues should the need arise in the future, a union must provide itself with the machinery for doing so. Indeed, if a union attempts to meet the problem by changing the number of delegates its local unions may send to conventions, it must amend its constitution at a convention in advance of the convention at which the dues question is considered.

Any union which wishes to present a dues increase proposal for action at its next convention is confronted by an even greater problem. If the union's constitution provides for weighted voting, it knows that it cannot follow that procedure without running afoul of the decision in the present case. But what procedure should it follow? If it simply counts the votes of its delegates equally, it runs the substantial risk of being sued for failing to follow its constitutional procedure! And even assuming that the decision below would furnish a justification for voting by a procedure not authorized by the constitution, what happens if that decision is subsequently reversed? The only safe procedure would seem to require two conventions. The first convention would amend the constitution to provide either a new procedure for voting on dues increases or a whole new system of convention representation. Then a new convention would be summoned, with such additional delegates as might be nec-

Union	Membership	Voting System
Retail, Wholesale and Department Store Union	111,000	M
American Federation of Government Employees	97,000	M
Transport Workers Union of America	80,000	DP
American Bakery and Confectionery Workers International Union	71,000	DP
International Chemical Workers Union	68,000	T
Allied Industrial Workers of America	63,000	T
International Alliance of Theatrical Stage Employees and Moving Picture Machine Operators of the United States and Canada	50,000	DP
Upholsterers International Union[b]	50,000	M
Utility Workers Union of America	50,000	M
United Shoe Workers of America	48,000	DP
International Union of Brewery, Flour, Cereal, Soft Drink and Distillery Workers	45,000	M
International Brotherhood of Firemen and Oilers	45,000	DP
United Furniture Workers of America	32,000	M
American Flint Glass Workers Union	29,000	T
Industrial Union of Marine and Shipbuilding Workers of America	28,000	DP
American Federation of Grain Millers	24,000	DP
American Newspaper Guild	23,000	T
The United Brick and Clay Workers of America	21,000	DP
Insurance Workers International Union	21,000	T
United Stone and Allied Products Workers of America	11,000	DP
Stove, Furnace and Allied Appliance Workers of North America	9,000	DP
National Association of Broadcast Employees and Technicians	4,000	M

[b] The Upholsterers International Union raises initiation fees, but not periodic dues, at Convention. The provisions of Section 101(a)(3), however, apply equally to initiation fees and periodic dues.

BRIEF FOR THE RESPONDENT IN OPPOSITION

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Supreme Court of the United States

OCTOBER TERM, 1963

No. 27

AMERICAN FEDERATION OF MUSICIANS OF THE UNITED STATES AND CANADA AND ASSOCIATED MUSICIANS OF GREATER NEW YORK, LOCAL 802,

Petitioners,

against

EDDIE WITTSTEIN, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF FOR RESPONDENTS IN OPPOSITION.

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Supreme Court of the United States

OCTOBER TERM, 1963.

No. 775.

AMERICAN FEDERATION OF MUSICIANS OF THE UNITED STATES AND CANADA AND ASSOCIATED MUSICIANS OF GREATER NEW YORK, LOCAL 802,

Petitioners,

against

EDDIE WITTSTEIN, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF FOR RESPONDENTS IN OPPOSITION.

Statute and Union Regulations Involved.

This case involves Title I, Sections 101(a)(1)(2), and USC §411(a)(1) and Section 101(a)(3), 29 USC §411(a)(3) of Title I of the Labor-Management Reporting and Disclosure Act of 1959, 73 Stat. 519 *et seq.*, 29 USC §401 *et seq.* (hereinafter called LMRDA)

The case also involves Title V, Section 501, 29 USC §711 (reproduced in the Appendix to this Brief).

The relevant *union* "law" is fully quoted in the Opinion of the United States District Court for the Southern District of New York (126A-130A).*

The Complaint (26a-41a) seeks a declaratory judgment nullifying as illegal the *entire* "RECOMMENDATION No. 11" (40a-41a). That RECOMMENDATION was a proposed resolution eventually enacted as AFM "law" by the "Sixty-Sixth Annual Convention" of the AFM held June 10-15, 1963 at Miami Beach, Florida. On *Petitioners'* motions for summary judgment, the District Court granted to *Respondents*, (who had not moved for it) *partial* summary judgment (2a). The original judgment appears (under an erroneous title) at 143a-144a; but that judgment was, on consent of the parties, revised (Petition, p. 7, footnote 7). That revision is here quoted, since it does not appear in the Petition:

> Defendant having moved this Court for an order modifying and clarifying the Judgment dated October 30, 1963, heretofore entered in this action; this Court having heard the arguments of counsel and having been fully advised, it is
>
> ORDERED that the first and second decretal paragraphs of the Judgment entered in this action on October 30, 1963 be modified so as to provide:
>
> "ORDERED, ADJUDGED, DECREED AND DECLARED that Items Nos. 3 and 4 of Recommendation No. 11 passed at the 1963 Annual Convention of the American Federation of Musicians of the United States

* The Appendix to Appellants' Brief in the Court below (white-covered book) is referred to by numerals immediately followed by the letter "A" and enclosed in parentheses; pages of the Appendix to Appellees' Brief in the Court below appear as numerals followed immediately by the letter "B" and enclosed in parentheses; and pages of the "OFFICIAL PROCEEDINGS" of the Sixty-Sixth Annual Convention printed by American Federation of Musicians of the United States and Canada are referred to as "Proc." followed by a numeral indicating the page of the printed proceedings.

and Canada, insofar as they increase the dues and initiation fees of its members, were invalidly enacted under Section 101 (a) (3) (B) (i) of the Labor-Management Reporting & Disclosure Act of 1959, 29 U. S. C. §411 (a) (3) (i); and it is further

"ORDERED, ADJUDGED, DECREED AND DECLARED that Item 2(a) of Recommendation No. 11 shall not be construed to authorize an increase of union dues payable by members without compliance with Section 101 (a) (3) of the Labor-Management Reporting & Disclosure Act of 1959, 29 U. S. C. §411 (a) (3)."

Thus, the case against the remaining illegal features of RECOMMENDATION No. 11 remains to be tried in the District Court, where it is still pending, and this appeal concerns only the *partial* summary judgment just quoted.

Questions Presented.

1. Was Petitioners' voting procedure which enacted RECOMMENDATION No. 11, at the Sixty-Sixth AFM Convention violative of Section 101(a)(3) of the LMRDA to the extent that it increased union dues and initiation fees?

2. Is Article 5 of the AFM Constitution, under which a "roll-call vote" purported to enact RECOMMENDATION No. 11, consistent with the LMRDA (especially Section 101(a)(3) thereof) since Article 5 does not vest full control over dues increases in members or their delegates?

3. Does the record before the Courts below demonstrate that Section 501(a) of LMRDA was so violated as to nullify RECOMMENDATION No. 11 entirely (and that the Courts below had pendent jurisdiction of such violation) because Petitioners' officers breached their trust in relation to the AFM and its members as a group by

(a) "railroading" RECOMMENDATION No. 11 through the said convention (Proc. 55-63; 114a-120a; 74a-104a);

(b) disobeying material and relevant provisions of Petitioners' Constitution and By-Laws;

(c) suppressing, before and during said convention, vital information needed by the delegates, members and Locals for intelligent consideration of so important a measure as RECOMMENDATION No. 11 and the problem it presupposed (29a-30a; 55a-56a; 74a-83a);

(d) misleading and misinforming the members, Locals and delegates respecting the problem with which the Recommendation purports to cope (74a-83a; 29a-30a; 55a-56a);

(e) limiting debate and discussion on RECOMMENDATION No. 11 at said Convention to 15 delegates, of whom nine were "hand-picked" by AFM President Kenin (who chaired the Convention and favored the Recommendation) to be members of committees which made the convention operate in railroad fashion;

(f) permitting vote splitting and the casting of between 26,000 and 52,000 duplicate ballots during voting on RECOMMENDATION No. 11?

4. Did the "OFFICIAL PROCEEDINGS" of the Convention demonstrate that the Convention procedures which purported to enact RECOMMENDATION No. 11 deprive the delegates at the said Convention of equal rights granted to all union members by Section 101(a)(1) of the LMRDA, thereby invalidating RECOMMENDATION No. 11 entirely?

5. Did the manner of conducting the Convention, as reflected in the "OFFICIAL PROCEEDINGS" thereof, deprive

delegates of freedom of speech and assembly under Section 101(a)(2) of the LMRDA and thus invalidate RECOMMENDATION No. 11 entirely?

Counter Statement of the Facts.

The facts and events here relevant are set forth in some detail in the complaint in 63 Civil 2548 (26a-40a) and more fully in the affidavit of Godfrey P. Schmidt (73a-104a).

At the Sixty-Sixth AFM Convention in Miami Beach, Florida, "RECOMMENDATION No. 11" (Proc. 55-56) was voted at an "Evening Session" between 12:10 A. M. and 2:30 A. M., June 13, 1963 (119a); the session began at about 8:00 P. M. on June 12th (Proc. 53-63; 118a). RECOMMENDATION No. 11, which is an omnibus enactment comprehending about a dozen different, and in some instances unrelated, matters (33a ¶41; 35a ¶47 and 48), increases (a) the "Annual Federation Per Capita Dues" (53a, paragraph 2); (b) "Federation Initiation Fees" (53a, paragraph 3); and (c) "Local regular periodic dues" (54a, paragraph 4). The text of RECOMMENDATION No. 11 had been distributed to the delegates less than six hours before the voting began (93a). No notice or information respecting it or respecting the somewhat similar RECOMMENDATION No. 2 (Proc. 83), had ever been distributed to the delegates, membership or Locals prior to the Convention.

Debate on this "burning question" (Proc. p. 31) was limited to speeches by *fifteen* delegates (Proc. p. 58) out of 1176 (Proc. p. 30), despite the fact that full discussion of the *problem* to which RECOMMENDATION No. 11 was addressed had been promised (80a) and is alleged to have preceded the Convention (80a-89a). Actually the "OFFICIAL PROCEEDINGS" show no discussion whatever of that *problem*.

But discussion of RECOMMENDATION No. 11 was limited to fifteen delegates of whom *nine* were hand-picked by AFM President Kenin (89a-92a).

Appellants were put on notice that they had a *problem* needing solution and that their "laws" needed amendment by complaints filed in the District Court in 1960, by the decision of the Court of Appeals dated October 17, 1961 (*Carroll* v. *A. F. M.*, 295 F. 2d 484), by the District Court's decision of November 2, 1962 (*Cutler* v. *A. F. M.*, 211 F. Supp. 433) and by the Court of Appeals' further decision of April 30, 1963 (*Cutler* v. *A. F. M.* 316 F. 2d 546 Cert. denied December 9, 1963). Nevertheless, Appellants came to the Convention without even a draft of any proposed solution to their problems or of any amended By-laws to bring AFM "laws" into conformity with Federal statute and with authoritative decisions construing it (83a-90a; 94a-95a).

AFM "laws" provide five methods of voting:

1. Article 28, (entitled "CONVENTION PROCEEDINGS") §2. AFM By-laws:

> "For Rules of Order, Robert's Revised Manual shall be the guide unless otherwise provided and the manner of voting shall be viva voce, unless otherwise ordered."

2. Unweighted votes by Convention delegates, under §21, Article 28 of AFM By-laws:

> "No alterations or amendment to the Constitution or By-laws (expect it is otherwise provided in the By-laws or ordered by a convention) shall be made unless proposed in writing, and said alterations or amendments must receive *a majority vote of the delegates present* to become a law, unless otherwise provided" (emphasis added).

3. The first part of Article 5, AFM Constitution calls for weighted voting by delegates, wherein each Local has from one to ten votes, depending upon the size of the Local's membership (126a).

4. Voting by written ballots is authorized by Article 28, §2, AFM By-laws, as supplemented by Robert's Rules of Order, §46, pp. 193-196.

5. Vote "on roll-call", is provided in the second part of Article 5, AFM Constitution (126a). An AFM official admitted that he had never in nineteen years of attendance at AFM Conventions seen this method used (11b).

AFM belatedly admitted (its "Official Proceedings" do not show this) that there were *two* voice votes (34b-35b) at the Convention. RECOMMENDATION No. 11 failed to pass either of them (30b; 30a "25). No standing or rising vote (as is required in the circumstances by Robert's Rules of Order) was called for by the Chair after it had twice announced that the "Ayes" and the "Nays" were "of equal response" (30b-31b). After the double failure of the "voice vote", an unnamed delegate proposed a vote by written ballot: "I think we should set the machinery in motion tonight or tomorrow morning for a ballot vote. This will give us the only real decision" (115a).

The Chairman (who is an attorney and AFM President: Herman Kenin) immediately misstated this request and answered: "Well, a roll-call vote is what you are referring to. Any ten delegates or five locals may ask for a roll-call vote if you are dissatisfied with the voice vote" (115a).

As if by prearrangement, the Chair immediately recognized Delegate Merle Snider, who instantly called for a roll-call vote (115). Conveniently, Snider said he *had* five locals. This was accepted by the Chair with alacrity as *mandating* a vote on "roll-call" (115a-116a).

In those portions of the *verbatim* minutes (114a-121a) of the Convention revealed by Petitioners, the latter carefully avoided any disclosures which might show the actual proceedings (a) *during the two voice votes* and (b) *during the transition from the voice votes to the proceedings just described* (35b-38b). Petitioners strenuously opposed Respondents' efforts to obtain the tapes or *verbatim* transcriptions of omitted portions of the proceedings (33b-38b; 27b-28b). Respondents contend that the Chair deliberately misrepresented the two voice votes; and that, in fact, the voice votes clearly and loudly rejected RECOMMENDATION No. 11 (98a). Play-back of the tapes (27b) would have shown this.

In any event, the record shows indisputably: that after failures of the voice votes to pass RECOMMENDATION No. 11, no motion to reconsider was offered (33b-36b); that the "roll-call" voting began after 12:10 A. M. on June 13, 1963 (119a); that a delegate asked for a *ballot vote* (115a) which the Chair immediately evaded by misrepresenting it as a call for a "roll-call" vote (115a), as to which the Chair ruled that, if the delegates "are dissatisfied with the voice vote", they could use the "roll-call" vote method (115a); that delegate Merle Snider, in calling for a roll-call vote instantly thereafter, presumed to speak for six Locals, although he was the delegate from only one of the six (115a); that Snider could not possibly have had time (except by pre-arrangement) to consult with delegates of five Locals other than his own in the instant between President Kenin's ruling on the delegate's request for a ballot vote (115a) and Snider's call for a roll-call vote (115a); that the Chair did not ask the delegates from the other five Locals whether, in fact, they had demanded a roll-call vote (115a-116a); that the roll-call voting procedure was

without precedent (116a) or so rare, as the Chair itself admitted (116a), that the latter had to explain it to the delegates (116a); that the "roll-call" voting procedure used by Appellants under Article 5 of the AFM Constitution (Appellants' Brief, p. 5) is quite different from the usual "Vote by Roll Call" ("Yeas and Nays") described by Robert's Rules of Order in §46 pp. 197-198 (Revised Manual) or used by Congress; that the Chair in a bumbling explanation of the "roll-call" authorized the splitting of the membership votes by the delegates (116a; 120a); that the Chair resisted all efforts to postpone the past-midnight vote until the next morning (115a; 117a-118a; 119a); that RECOMMENDATION No. 11 was rushed through in great haste (117a-119a; 89a-93a); that delegates found the conglomerate nature of RECOMMENDATION No. 11 a handicap for the purposes of consideration and voting (115a; 117a-117a); that a minority of the individual delegates voted for RECOMMENDATION No. 11 (Proc. 7-30; 58-63); and that the AFM *members* (as distinguished from their *delegates* at the Convention) had not the faintest knowledge of RECOMMENDATION No. 11 and the midnight debate concerning it at the Convention (93a-98a).

In conducting the "roll-call" vote, Petitioners included at least between 26,000 and 52,000 duplicate votes (33a-34a; 73a-74a; 2b-7b; 12b-22b; 109a); and they authorized and allowed vote-splitting by the delegates (23b; 116a; 120a) according to the sole discretion of the delegates from each represented Local.

The number of delegates attending the Convention was fixed at 1,219 by the Convention's Credentials Committee (7b-10b).

The vote which enacted RECOMMENDATION No. 11 was 158,068⅔ favoring "YES" and 113,742⅓ favoring "No"

(Proc. 63).. Thus, the margin was 44,326⅓. The total number of votes cast by the 22 Locals which had split membership ballots was 15,066 (Proc. 58-63). Exactly how many duplicate votes were cast was not consistently admitted by Petitioners. Scola's first affidavit states: "approximately 26,000 are members of two or more locals" (46a). He confirmed this on the stand (2b-3b):

> "Q. Did you give him [Petitioners' attorney] any information to the effect that there were 26,000 members of the AF of M who belonged to two or more locals? A. Yes.
>
> Q. And this is what you meant when you wrote paragraph numbered three of that affidavit? A. That's right.
>
> * * * * * *
>
> Q. You said that approximately 26,000 members * * * are members of two or more locals; isn't that correct? A. That's correct, sir.
>
> Q. Is that a correct statement? A. That is what I said" (3b).

This would mean, necessarily, that *at least* 52,000 votes were duplicates (33a paragraphs 39 and 40). But Scola's second affidavit (108a-109a) contradicts this. There (109a) he states that "12,381 members of the Federation are members of more than one Local;" and that they involved at least 26,174 duplicate ballots. AFM witness Neri testified (17b) that he could not be sure of the 26,174 figure: "It might come up with more".

The total of the split votes, 15,066, and the sometimes admitted duplicate total of 26,174 amounts to 41,240 which almost wipes out the margin of 44,326⅓ by which RECOMMENDATION No. 11 was passed. If Scola's earlier testimony and affidavit are correct, the duplicate votes exceeded 52,000. Neri's testimony confirms (12b-21b) that the AFM figure of 26,174 is unreliable.

POINT I.

Argument in answer to Judge Marshall's dissent and to the Petition.

I. Critique of Judge Marshall's Dissenting Opinion.

The dissenting opinion of Judge Marshall (92-13a of the Petition) is based upon a number of errors of fact and of reasoning:

1. Judge Marshall neglected the facts that Article 5 of the AFM Constitution, under which the Convention undertook to increase union dues and initiation fees, places final and effective decision for such increases in an overall Convention Committee and not in the *delegates* to the Convention; and that this in and of itself constitutes violation of Section 101(a)(3) of the LMRDA.

2. Judge Marshall *assumes*, without support in the record, that a relevant "weighted voting system appeared in many representative union constitutions prior to enactment" of LMRDA (Petition, p. 9a); and that the majority opinion below is inconsistent with all systems of weighted voting *by Locals*. Local unions which sent to Conventions greater or smaller numbers of delegates, *depending upon the sizes of their memberships*, exemplify a "weighted voting system" *by locals* which is *not* forbidden by Section 101(a)(3) of LMRDA, as construed by the majority below. According to Mr. George Meany's affidavit (110a-111a ¶4) "*most other international unions*" employ *such* a system of "weighted voting", by sending to a convention a "number of delegates * * * based on the number of members in the local" (110a-111a). Such a system is democratic and

representative. It avoids the concentration of power which results from granting to *a small number of delegates a large number of votes*, as happened in the AFM Convention (Proc.-pp. 30; 63) where *two delegates* from Local 802 cast 28,438 votes, upon the basis of their *own personal decision* as to *how* they should be cast and *without the knowledge* of the 28,438 members whom they purported to "represent". Neither the Local nor its membership received notice of RECOMMENDATION No. 11 or of the PROCEEDINGS at the Convention, until the Convention was over. Not only was no notice of RECOMMENDATION No. 11 sent to the *members;* no previous notice was sent to the *delegates* themselves, *except six hours prior to the midnight session at which* RECOMMENDATION No. 11 *was enacted* (93a-98a).

3. Contrary to the legislative history of LMRDA and without basis in the Record, Judge Marshall concludes that the statutory provision in question "was not brought about by any abuses found to have flourished under the *egis* of that [weighted voting] system". Judge Marshall also assumes that the National Legislature knew nothing about the "Report to the Fund for the Republic" (July, 1959) entitled "UNION CONSTITUTIONS", written by Leo Bromwich with assistance from the staff of the Institute of Industrial Relations, U. C. L. A. Under the heading, "Who Runs the Convention?", Mr. Bromwich writes (p. 11):

> "Of the [seventy] unions in the sample, thirty-three have a graduated scale of representation which tends to favor the smaller unit. * * * However, a number of the unions, among them some of the largest in the country, follow a different practice of allowing a permanent membership-delegate ratio regardless of whether the local unit is big or small * * *.

> "In addition, *most of the unions guard against the concentration of too much power in the hands of a single delegate* by specifying the maximum number of votes a delegate may have * * *." (emphasis added).

Judge Marshall relies on Leiserson's "American Trade Union Democracy", page 122. The quotation he makes in footnote 2 (Petition, p. 9a) merely states that "in *some* conventions" (emphasis added) the "full membership of each local union is voted by its representatives". In *most* unions, the quotation states, ambiguously, each local casts a "fixed number of votes *proportionate to its membership*". This last quoted sentence can mean exactly what Mr. George Meany says occurs "in most other international unions" (110a-111a "4) where delegates (and therefore votes) are proportionate to membership. This is permissible under the Act *as construed by the majority below*. Also, Judge Marshall omitted a significant final sentence from a paragraph which he quoted in footnote 2 (Petition p. 9a):

> "Often the elected delegates are *instructed by their locals how they should vote on certain issues*" (emphasis added).

No opportunity for this was allowed under the undemocratic and unrepresentative procedure used by the AFM Convention in question; because neither the delegates nor the members, prior to the Convention, had any notice whatever of RECOMMENDATION No. 11 or of the plans of AFM officers to increase dues and initiation fees behind the members' backs.

4. Judge Marshall failed to quote portions of Leiserson's book which support the view expressed by Mr. Meany (110a-111a):

"Every local union however small its membership is entitled to at least one Convention delegate • • •. Beyond the first delegate, *representation of local unions is usually in some proportion to their membership* • • •. Often also, a maximum number of delegates is fixed that no local may exceed • • •" (emphasis added; p. 128)

"• • • Although proxy voting is generally prohibited • • • every convention delegate casts not only his own vote, but a share of the voting strength of the union he represents as well • • •. The basis of representation and the methods of basing voting strength on size of local memberships differ among the unions, but three main types are recognizable in the constitutions.

"*The first is the most common. This .s both the number of delegates and the number of votes on the same specified number of members* so that both increase rapidly in proportion to membership increases • • • *This maximum is an incentive to add delegates as membership rises above a thousand* • • •.

"The second type holds down the number of delegates but grants additional votes in direct proportion to membership • • •.

"The third type increases both the number of delegates and the votes at a lessening rate as the membership increases • • •.

"All three types attempt to balance in some measure the representation of local government units and size of membership i.e. of small and large locals" (emphasis added).

Dr. Leiserson died (as the "Preface" states) in February, 1957, and his posthumous work was published in 1959 (the "Foreword" is dated January, 1959). No statistical details to support the ambiguous generalizations quoted above and the names and number of the unions studied are given.

5. Contrary to Judge Marshall's view (Petition pp. 9a; 13a) abuses in the conduct of Conventions did come to the attention of Congress:

(a) Robert F. Kennedy, then Counsel for the McClellan Committee, visited the writer of this Brief to obtain the record of a trial which upset a rigged convention of Joint Council 16 of the International Brotherhood of Teamsters in 1956 (*Lacey* v. *O'Rourke*, 147 F. Supp. 922); and the McClellan Committee gave two volumes of investigation to this case and its sequel. See Investigation of Improper Activities in the Labor or Management Field, "Hearings before The Select Committee" Part 11 and Part 12 (August 7, 8, 9, 12 and 13; July 1, August 14, 15, 16 and 19, 1957) for a detailed expose on a rigged convention of Joint Council 16 I. B. T.

(b) The McClellan Committee also carefully studied the rigged I. B. T. Convention at Miami Beach in 1957 which resulted in the election of Mr. Hoffa and other officers of the Teamster Union (*Cunningham* v. *English*, 269 F. 2d 517).

(c) Secretary of Labor James P. Mitchell testified at "Hearings (p. 257) before the Sub-committee of the Committee on Labor and Public Welfare, United States Senate, 86th Congress, First Session, on bills pertaining to Labor Management Reform" (out of which the LMRDA eventuated) about the rigged 1956 Convention of the Bakery and Confectionery Workers International Union, at which the President of that International had "railroaded through" changes in the Union constitution which destroyed remaining pretenses of union democracy. He also testified, using Reports of the McClellan Committee as his source, that Teamster officials crushed democracy within that Union's ranks by rigging elections among other things; and he referred to the then recent International Convention of the Teamsters in Miami, at which Mr. Hoffa

and his associates made a mockery of International Constitution by manipulating convention delegates (r. 257).

(d) Senate Report No. 1417, 85th Congress, Second Session, entitled "Interim Report of the Select Committee on Improper Activities in the Labor or Management Field" (p. 452) has this to say on the subject of industrial democracy:

> "The Committee recommends that legislation be enacted *assuring democratic procedures in labor unions.* In the Committee's opinion, legislation should be directed, thou[redacted]not limited, to three principal ends: 1. The periodic election of officers; 2. *The use of secret ballots in union elections and other vital decisions;* 3. A limitation on the right of internationals to place local unions in trusteeship or supervisorship. [Secret ballots are *not* weighted.]
>
> "*Much that is elicited in the Committee's findings of misconduct by union officials can be substantially improved, in the Committee's view, by a revitalization of the democratic processes of labor unions.* • • • While the Committee feels that the bulk of American unions operate fairly and democratically and agrees with the principle that the Federal Government should not interfere in a normal functioning, it is still of the opinion that certain basic standards of democratic porcedure should be established by law • • • " (emphasis added).

6. Apparently, Judge Marshall neglected to consider that there was no *democracy* nor real *representation* at the AFM Convention, where *two delegates* could and did *make up their own minds* (without consultation with anyone) as to how 28,438 votes should be cast. That procedure, so unrelated to the unknown wishes of the 28,438 members, was *assumed* to be both "representative" of members and

"democratic" by Judge Marshall. The members were as innocent as babes unborn of any knowledge of what was going forward at the Convention. It makes no sense to suggest that this "roll-call procedure" was democratic, or representative of the membership. The "roll-call" vote was simply a tally of the individual preferences of each unit of delegates, and not of the sentiments of the members at home. Individual delegates were rushed into deciding *for themselves*, at a midnight session, whether the total membership strength of their respective locals should be cast for "YES" or for "NO" or for some sort of split, without adequate notice or debate and without the slightest opportunity for instructions from the members they purported to "represent". The delegates of large Locals, especially if they struck up a combination with the Federation officials who were running the election, could under this procedure control the Convention and the other delegates. A relatively few of them, in combination, could readily take over the Convention. The fact that there were relatively few delegates with large voting power (only 111 delegates out of 1176 cast 121,180 votes out of 271,811) would provide the easy means and incentive to International officers to strike up alliances to control the Convention and would facilitate concentrations of power which are the very antithesis of "democratic" or "representative" union government (Proc. 7-30; 58-63).

7. Upon some undisclosed basis, Judge Marshall comes to the conclusion that "elimination of the weighted voting system was not consciously put forward as a goal of the Act" (Petition, p. 9a). What went on in the consciousness of the various legislators we have no way of knowing. But we do know, as even Judge Marshall admits, that the main thrust of LMRDA was "to correct the flagrant abuses of

power by some union officials which had been uncovered by extensive congressional investigations'' and to mandate adoption of *more democratic*, intra-union procedures. The procedure used at the AFM Convention lent itself to such *abuse of power* and to such *concentration of power* as negatived democratic and representative government. Thus, the indisputable purpose of the LMRDA, as set forth in its legislative history, in the legislative documents and in court commentary, commends use of the ''plain meaning'' rule as employed by the majority below.

8. Judge Marshall argues (Petition, p. 10a): ''Nor does any reason readily suggest itself for barring the weighted ballot system in connection with dues increases voted at union conventions * * *.'' Respondent's Brief in the Court below *suggested* a number of these reasons in the following language (pp. 25-27):

> ''* * * Appellants gave *control* over dues increases to a powerful Convention Committee, and not to *members or delegates*. They created class distinctions among delegates. Some are more powerful than others. Some have more votes than others. They are the ones to be cultivated or courted by union officers. The delegates had no real opportunity, under this method of 'representation', to discuss the matter with other delegates. Before they came to the Convention, the delegates never heard about the complex Recommendations numbered 2 and 11.
>
> ''The roll-call vote had no connection whatever, by way of 'reason' 'representation' or otherwise, with the strength of local memberships *except* that the delegates were able to *magnify* their own *individual* choices by weighting them with all or part of the membership strengths of Locals. * * * The vote which passed RECOMMENDATION No. 11 constituted union replacement of a Congressional rule calling

for a 'majority vote of the delegates voting at the convention'.

"The method of voting which passed RECOMMENDATION No. 11 actually presupposes a series of impromptu, intra-delegation decisions *by the uninformed delegates* in a midnight session. These decisions were a necessary prelude to the casting of 'membership' votes. The delegates themselves made up their own minds and expressed their own predilections. On that basis *they* cast not their own, but their *Locals' weighted votes.* Each individual delegate had first to decide *for himself* (a) whether the vote was to be split; (b) how it was to be split; and (c) whether to vote 'YES' or 'No'. The members were forgotten men. • • •

"Prior to the Convention and, indeed, prior to the Evening Session, no convention rule and no provision of union law required these intra-delegational, personal decisions to be made by the individual delegates upon the basis of consistent policy. How the membership-weighted votes were cast for the various Locals participating in the roll-call depended entirely upon the subjective, undisclosed preferences of the individual, *voting delegates.* • • • The tally shows the ballots of *locals* and not the ballots *of delegates.*"

Another reason is forcefully given by the "PROCEEDINGS OF THE THIRTY-NINTH ANNUAL CONVENTION" of the AFM (in 1934) in the following excerpt from the Report of the then AFM President, J. Weber:

"As to the mode of voting at Conventions, in answer to the misleading statement of McCann concerning same, I made the following explanation to the Senate Committee: "• • • locals having more than 300 members have one additional vote for each 100 members up to 1000. However, no local can cast more than 10 votes. The vast majority have

> only 1 or 2, * * *. This setup is necessary for the reason that New York and about twenty other unions in large cities, with their thousands of members, *a relatively small number of local unions, could control the entire organization composed of over 700 locals. The result would be disintegration of the organization. This is exactly what happened to the first organization of musicians, the National League. A few large locals dominated it and as a result it fell by the wayside*" (pp. 60-61; emphasis added).

9. Judge Marshall opines " * * * that, with regard to election of officers, and indeed, any other action taken at these conventions, the system is perfectly acceptable" (Petition, p. 10a).

In the first place, the provisions of Title IV of the LMRDA, not Title I, govern elections of union *officers*. In the second place, elections *of officers* take place only after necessarily well publicized nominations. The very fact of formal or informal nomination, long before the date of elections, constitutes adequate previous notice of what is at stake for the members and the locals. Even where, as is usual, union incumbents are renominated, the *fact that they will be renominated* is well known to all realistic, rank-and-file members not only months, but often years, before the next election. That officers or candidates will run for office cannot possibly be hidden from the members. No one even tries to hide it. On the contrary, candidates always publicize the fact of their candidacies. By contrast, if the purpose is to avoid furtive, autocratic control (such as was exercised by a few AFM officers at the Convention) of dues, initiation fees and assessments, the "weighted-ballot" system which Judge Marshall advocates and which the AFM Convention exemplified is not "perfectly acceptable", because it is the very antithesis of genuinely *demo-*

cratic procedure. It lends itself to easy manipulation by a relative handful of union officers allied with powerful union delegates.

Most of the delegates voted against RECOMMENDATION No. 11 (103a; Proc. 7-30; 58-63). Out of more than 605 Locals (Proc. p. 30), only 4 have more than 5,000 members each. These 4 Locals control 60,394 votes by means of a maximum of 12 delegates. (Sometimes one or two of three delegates may be absent; so that the remaining two delegates or one delegate would cast the entire vote for the Local.)

Only 11 AFM Locals (in addition to the 4 just mentioned), with a maximum of 33 delegates, have more than 2,000 members. This means that under the "roll call" procedure forty-five delegates, at most, can cast 91,687 votes. In addition to the 15 Locals just referred to, only 22 AFM Locals have 1,000 or more members, whose membership-strength is wielded by 66 delegates.

All this means that 111 delegates from as few as 37 AFM Locals out of 675 Locals (46a ¶3) cast 121,180 ballots (out of a total of 271,811 ballots) under Petitioners' "democratic" voting system. For all practical purposes that puts control over a convention of 1,176 delegates into the hands of 111 delegates, who first decide *for themselves* and *without consultation with or notice to members* how they will vote and then *multiply* their mere 111 choices to get a product of 121,180 votes.

Congress, whose manifest intention was to put control of dues increases in the hands of the *members* or *delegates*, cannot be assumed (against the mandate of the "plain language" of the statute) to have intended approval of such a blatantly undemocratic arrangement, which gives control over a Convention of 1176 delegates to about one-tenth of the delegates.

10. Thus we are *not* left, as Judge Marshall suggests (Petition, p. 10a) with the "plain meaning" rule as "the only basis for the majority decision." We have, in addition to the foregoing considerations: the general *purpose of the Landrum-Griffin Act*, the specific purpose of Congress to vest control over dues increases in the *members* or their *delegates*, the patently *undemocratic* and *unrepresentative character of the weighted voting* method, the *legislative history*, the *legislative documents*, and the AFM provision which places control over dues increases in the powerful Convention Committee (AFM Constitution Article 5) in actual and convenient alliance with a relatively small number of delegates, whose *personal* vote is magnified beyond recognition by the heavy weighting of their Locals' members.

11. As Judge Marshall points out, the statutory language reads: "majority vote of the delegates voting", and not "vote of a majority of the delegates voting". But it is also true that the vote-tally at the Sixty-Sixth Convention did not reflect a majority vote of the *delegates* who voted at the Convention. In no honest sense can it be said that it was the vote of the *delegates* which was *counted*. It was the *membership* vote which was tallied. The statute required that the vote be a *majority* vote and that the vote be a *delegate* vote. The *delegates* are supposed to be the "representatives" of the *members*. Not the members, but the delegates alone, were supposed to vote at the Convention.

Moreover in sub-paragraphs "A" and "B" of Section 101(a)(3) of the LMRDA, the phrase "majority vote" is used *five different* times in the same way and with the same meaning:

> (1) *(A)(i)* "*by majority vote*, by secret ballot, of the members in good standing."

(2) *(A)(ii)* "*by majority vote* of the members in good standing."

(3) *(B)(i)* "*by majority vote* of the delegates."

(4) *(B)(ii)* "*by majority vote* of the members in good standing."

(5) *(B)(iii)* "*by majority vote* of the members of the executive board." (emphasis added)

In each of these cases, the words "majority vote" mean the same thing: *Noscitur a sociis.* If Congress intended something else, it could easily have said so.

12. Despite this, Judge Marshall asserts that the phrase "majority of the delegates voting" is susceptible of "the interpretation, perhaps not without some strain, that delegates may have differing voting strength, depending upon the size of the locals which they represent." (Petition, p. 10a.) Thus the judge concedes that only a strained interpretation yields the meaning that *delegates* (as distinguished from the *locals*) may have differing voting strength, depending upon the size of the locals. Locals or *delegations* (not delegates) *may* lawfully have different voting strengths in proportion to the memberships of the particular Locals. That is the form of proportional representation which Mr. George Meany's affidavit (110a-111a) indicates is the most common method of voting at international conventions. In the context, there is no more reason why "majority vote of the delegates voting" should be construed to endow delegates with weighted votes than there is for assuming that "majority vote of the members in good standing" or "majority vote of the members of the executive board" means weighted votes for such members.

13. Judge Marshall seems to think that there are "compelling reasons to give such interpretation and none to

give the more apparent one". (Petition, p. 10a.) The situation is, in fact, precisely the opposite of what Judge Marshall says. There are many compelling reasons to give the words of the statute their *plain meaning:*

(a) The *purpose of the LMRDA* to mandate democratic procedures;

(b) The *purpose of Section 101(a)(3) to take away from labor union leaders the power to increase union dues*, assessments and initiation fees;

(c) The *purpose of that Section to vest control over increases in union dues, assessments and initiation fees in the members or in the delegates* elected by secret ballot to represent the members;

(d) The fact that, if Congress had intended to authorize weighted voting by individual delegates and to burden delegates with class distinctions, Congress could easily have said so.

(e) The fact that the roll-call vote actually employed by the AFM Convention was nothing but a pious facade, contradicting the very meaning of "representation" and "delegate" and made to resemble *in mere words* membership participation, whereas in fact it was a ploy utterly devoid of genuine membership participation of any kind.

(f) The very notion of a "convention" as an assembly of peers, who debate and consider matters on an equal footing and on the basis of *truth* and *logic, not power*, a notion which the National Legislature certainly favored, if the legislative history is any index.

(g) The fact that the plain meaning of the statute was not disputed during the lengthy and intensive scrutiny given by organized labor and others to proposals for labor reform legislation at the time is proof of the fact that Congress had a right to conclude that its plain words and their plain meaning raised no

issues from those who were not hesitant to raise numerous, even captious, issues with respect to other matters. In this respect, Judge Marshall (Petition, p. 13a) admits that the Act was submitted to multitudinous criticisms which never raised the problem here involved. This simply proves that (a) the plain meaning of the statute was not regarded as being in conflict with the majority operations of labor unions in the United States; and (b) the "plain meaning" here does *not* lead to "incongruous and even unjust results," as Judge Marshall suggests (Petition pp. 10a-11a). The cases cited by Judge Marshall in this respect concern, by contrast, really incongruous and unjust results which militated against employment of the "plain meaning" rule.

14. Judge Marshall's quotation (Petition, p. 11a) of remarks by Senator McClellan about increases of initiation fees simply confirms what Respondent affirms in this Brief. So does Judge Marshall's statement (Petition, p. 12a):

> "The purpose of the section was expressed in various ways, but emphasis was always placed on ensuring members the 'right to participate in deciding upon rates of dues' * * *".

It is sheer travesty to suggest that the *members* in this case participated in deciding upon the rates of dues rammed through the Sixty-Sixth Convention, when (a) they knew nothing whatever about RECOMMENDATION No. 11 until the Convention was over; (b) their so-called representatives, the delegates at the Convention, themselves first learned about the matter only six hours before the midnight session which was asked to enact it; (c) debate on the subject was limited to 15 delegates out of more than eleven hundred; and (d) out of the fifteen delegates allowed to discuss this most important matter, nine were hand-picked by the AFM

President (who wanted RECOMMENDATION No. 11 passed) as members of the Convention Committees which operated the Convention. It would seem that Judge Marshall has permitted conceptualism to turn his gaze from the facts in this case to abstractions. On that basis, he legislates and *repeals*, instead of construing. Congress, as he says, intended "merely to assure that dues increases could not be imposed by irresponsible or arbitrary labor union leaders not answerable in any way to the membership at large" (Petition, p. 13a). But RECOMMENDATION No. 11 was railroaded through the AFM Convention, and dues increases were thereby imposed, by "irresponsible and arbitrary union leaders" who had ample opportunity to notify the membership months before the Convention but who, desiring not to be "answerable in any way to the membership at large", kept the matter a secret until six hours before the midnight session (93a-98a).

15. Judge Marshall conjures up a horrendous spectacle of 14,000 delegates (at $300 a delegate, the expense would be $5,200,000) called to a convention by an international organization of 280,000 members! (Petition, p. 13a). Apparently, he arrived at this absurd total of 14,000 delegates by dividing the total membership of the Federation (which approximates 280,000) by twenty, the membership of the smallest AFM Local (No. 629 of Waupaca, Wisconsin)! Locals of the Federation of 150 members *or less* are entitled *to one delegate* (AFM Const., Art. 5). Therefore, Judge Marshall should have divided the 280,000 figure by 150 not by 20. The quotient would have been about 1,866 (rather than 14,000). A *reasonable ratio of delegates to members* would produce an arithmetic less perturbing than Judge Marshall's frightening but unrealistic figure of 14,000. By using a prudent ratio of one delegate for

each unit of 250 members after the initial 150, the number of delegates would be about the same as the number attending the Sixty-Sixth Convention!

16. Nor is there anything in the record that justifies Judge Marshall's conclusion that the method used at the AFM Convention was a "perfectly normal and accepted means of voting at union conventions." If Congress needed any evidence of abuses clamoring for the construction placed upon the statute by the majority below, the manner of conducting the Sixty-Sixth Convention would supply that need.

II. Critique of Petitioners' reasons for granting the writ, insofar as those reasons have not already been dealt with in this Brief by way of the foregoing critique of Judge Marshall's dissenting opinion.

17. The *dictum* in the majority opinion (Petition, p. 10) to the effect that the invalidated weighted voting system "is a method of voting widely recognized as fair and proper by a number of unions * * *" finds no support in the record; nor even in Dr. Leiserson's posthumous study. Mr. George Meany's affidavit contradicts (¶4, 110a-111a) the conclusion that the invalidated method is "widely" used; and common sense reveals that the method actually used by Petitioner in its Convention was neither fair nor representative.

18. It is not true that the effect of the majority decision below is (Petition, p. 11) to require many international unions ("if they are ever to raise their dues again") "to replace more democratic with less democratic voting procedures" (Petition, p. 11). The interpretation made by the majority suggests the really democratic and representative

expedient of *increasing the number of delegates according to some sensible ratio* (see Section 15, *supra*) so that the large unions will have more *delegates* than the small unions. On its face, this is better than concentrating too much voting power in a few delegates. This is a method used by "most other international unions", according to Mr. Meany (110a-111a).

19. What Petitioners call (Petition, p. 11) the "wholesome principle of equal membership representation" as exemplified by the Sixty-Sixth Convention is actually a fraud on the membership. It verbally pretends to some relationship with *membership* wishes. At the same time, it actually conceals from the members any advance knowledge of the principal business of the Convention; so as to prevent the members, in the home Locals, from consulting with, and from instructing, their delegates *upon the basis of majority votes cast by the members, at their own Local union halls.*

20. Nor is it true, as Petitioners suggest (Petition, p. 11), that, under the majority opinion below, the AFM (or other internationals) would have to so increase the delegate strength of the larger locals as to make the holding of a convention exorbitantly expensive, if not physically impossible (see Section 15, *supra*). Only a union administration daft enough to require one delegate for every 20 members would, in an organization of 280,000 members, invite 14,000 delegates to an annual convention at a cost of $5,200,000, which is three times more than their annual income! If, by contrast, every Local with 150 members or less is entitled to one delegate (as the AFM Constitution requires); and if, thereafter, a Local had one additional delegate for each unit of 250 additional members (or a major fraction

thereof), the number of delegates would not exceed the precise number of delegates attending the Sixty-Sixth Annual Convention.

21. The Petition (p 12) refers to "the number of international unions affected and the fact that these unions periodically hold union conventions at which the question of raising dues can arise * * *," as if there were evidence in the record that other unions operate their conventions as did the AFM. Few, if any, international unions conduct conventions in the ram-rod manner of the AFM Convention, where RECOMMENDATION No. 11 was pushed through the Convention without previous notice to the Locals, to the members or to the delegates. If, indeed, there be such other internationals, the majority decision below is a wholesome remedy, banning undemocratic and unrepresentative processing of important pieces of union legislation.

22. The Petition (p 13) asks whether Congress has the power, to set aside a "rule of self-government that in the words of the Court below, is 'the most democratic method * * *, which harms no one and which has not been found to be the subject of any abuse'"? The Sixty-Sixth Convention was no act of *self-government* by either *members* or *delegates*. The invalidated method would be a democratic method, only *if it were preceded by votes of the home Locals instructing the delegates as to the position they should take at the Convention with respect to Recommendation No. 11.*

23. It is simply untrue that the "weighted method" of balloting used at the Convention "is to all appearances the most 'democratic' method in the sense that each member is duly represented" (Petition, p. 14). That is a purely

conceptualistic view, having nothing whatever to do with the realities of the Convention, where no member was *represented* in any genuine sense. No member's views on the *Recommendation* were considered by the delegates (who cast weighted ballots *according to their own personal views.* and not according to the wishes of members by whose number they ballasted their *own* wishes). The members could have no views on subjects of which they were utterly ignorant.

24. The decision below does not deny *equality of representation to the members* (Petition, p. 15). But it does deny *inequality of voting to the delegates.* The *members* at the home locals have *equality of representation when, by secret balloting, they elected their delegates.* From then on decision was in the hands of the *delegates,* under the statutory scheme of things. The manner in which the Convention was conducted repudiated that statutory scheme and destroyed equality of delegates (as union members). Section 101(a)(1) required:

> "Every *member* of a labor organization [surely this includes *delegates* who are all *members* of the AFM] shall have *equal rights and privileges within such organization* • • • *to vote in elections* or referendums of the labor organization, • • • *and to participate in the deliberations and voting upon the business of* • • • [union] *meetings,* subject to reasonable rules and regulations in such organizations' Constitution and By-laws" (emphasis added).

25. Likewise, when Petitioners limited debate on the most important question which ever confronted an AFM Convention to speeches by 15 delegates at a midnight session and that nine of the fifteen were delegates who had been chosen by AFM President Kenin for membership on

Convention Committees, there was a clear violation of Section 101(a)(2). Delegates, who are all AFM members, were denied a right "to express at meetings of the labor organization * * * views * * * upon * * * business properly before the meeting [Convention]"

26. The Court below did not, as the Petition (p. 15) suggests, read Section 101(a) (3) (B) (i) without considering Section 101(a) (1). In fact, the ruling of the majority below is the only ruling that could give consistent effect to the language of both sections.

27. It is significant that, as Petition admits (Petition, p. 16), AFL-CIO President Meany testified at a Hearing before a Joint Committee of the House: "Section 101(a) (3) actually permits changes in dues * * * by every method which unions *generally* employ, *except* action by a general Executive Board or similar body" (emphasis added). In other words, Mr. Meany had only one criticism of section 101(a), because it embodied what unions *generally* had been doing. The Act was changed (to meet Mr. Meany's criticism) to allow constitutionally authorized executive-board action. Presumably, President Meany had no further criticism of section 101(a) thereafter; especially since it clearly means what the majority opinion below says it means; and on this even the dissenting Judge agrees.

28. Against the background provided by the foregoing paragraph, it is strange to read on page 16 of the Petition: "The courts should not attribute to Congress a silent intent to outlaw a historic and concededly democratic practice of a substantial portion of the labor movement." The lower Court attributed to Congress only the intention which is clearly explicated in the very language used by Congress.

Mr. Meany knew better than anyone else what was *historic* in a *substantial portion* of the labor movement. In his testimony before the Joint Sub-committee of the House, which considered 101(a) (3), he found no fault with that section as a violation in the respect of the practice of a *substantial portion* of the labor movement. His affidavit (110a-111a) in the instant case clearly shows that *most other unions* elect larger or smaller numbers of *delegates* to conventions in proportion to their membership. They weigh in proportion to membership, by increasing the delegation and not the votes of the delegates.

29. The fact that the Barden Bill and the McClellan Bill (and any other bill), *formally rejected by Congress*, called for a vote which was *numerically equivalent* to the number of members in the constituent units proves nothing. Senator McClellan and Congressman Barden eventually voted for the Landrum-Griffin Bill. This shows that eventually they *changed their minds*. Nor does it matter *why* the Barden Bill and the McClellan Bill were rejected by Congress. The significant point is that Congress enacted the Landrum-Griffin Bill. Therefore, Petitioners' speculation (Petition, p. 19) to the effect that these bills were rejected, not because Congress was opposed to weighted voting, but because it was unwilling to restrict unions in formulating voting procedures is irrelevant. The Landrum-Griffin Act is replete with restrictions on union voting procedures. Indeed, so thorough-going was Congressional regulation of union voting procedures that practically every important union in the United States had to change its Constitution and By-laws as a result of the passage of the Landrum-Griffin Act.

30. The argument by which Petitioners (Petition, p. 20) seek to bolster their contentions by means of the First

Amendment is so artificial and so unsupported by the cited cases that it deserves no extended comment. If the right to form labor organizations "must necessarily encompass the right of the members to determine the form which such organizations will take and particularly the basis on which the wishes of the members are to become union law" (Petition, p. 21), then most of the Federal Labor Relations Laws should be repealed or modified. It is bald abracadabra to talk of the right of *members* of an organization to allocate voting strength in this context, since it was a minority of the delegates personally, and not the members, who allocated the membership votes (Proc. 7-30; 58-63).

POINT II.

The Sixty-Sixth Annual AFM Convention increased Union dues and initiation fees in violation of Section 101(a)(3), Title I, of LMRDA.

A. Article 5 of the AFM Constitution, under which the AFM Convention undertook to increase Union dues and initiation fees, places final and effective decision for such increases in an overall Convention Committee and not in the delegates to the Convention, as the statute requires in the circumstances. RECOMMENDATION No. 11, as its text shows, did purport to increase (a) the "Federation Initiation Fees," (b) the "Local regular periodic dues" and (c) the "Federation Per Capita Dues" (Proc. 54-55).

The language of the LMRDA supports the interpretation of Section 101(a)(3)(B)(i) made by the Court below. The phrase under consideration is: "majority vote of the delegates voting at a regular convention." Here the noun, "vote," is not only modified by the word, "majority," (which is used adjectively) but also by the prepositional, adjectival phrase: "of the delegates voting at a regular

convention." It is not just the vote of an undisclosed "majority"; it is the vote "of the delegates voting" at the Convention. Even if one assumes that the single word, "majority," does not mean a majority *of the delegates* but rather a majority *of the votes*, the prepositional, adjectival phrase, "of the delegates," clearly modifies and characterizes the word, "vote." The vote belongs to the delegates. It is a vote "of the delegates voting," who must be in the majority to increase dues and initiation fees in a lawful manner.

The meaning given to this language by Appellants would turn the very weapon, which Congress gave to rank-and-file members for protection against union officers seeking to increase dues and initiation fees, against such members. Delegates whose voting power is magnified or multiplied by factors equal to the number of members in large locals would enjoy a strength and influence not owned by delegates from small locals. Such "strong" delegates, allied with the incumbents, could easily control conventions and dues increases. They could defeat control by the membership. A relatively few of them could take over a convention. The preposition, "of," in the phrase, "of the delegates," is indicative of possession by all the delegates. The vote at the AFM Convention was not just a "vote of the delegates". The LMRDA gives delegates "*voting at a regular convention*" or the members control over dues increases. Even Appellants' Brief (p. 12) admits that the word, "vote," clearly refers to a delegate vote . . ." (emphasis added). The roll-call vote procedure employed for the purpose of increasing membership dues and initiation fees was not based upon the "majority vote of the delegates voting at a regular convention" (emphasis added).

Congressional debates on the Landrum-Griffin Act as well as relevant Congressional Reports prove that the

chief purpose of Congress in passing this legislation (134a-138a) was to take from union officers, who had frequently abused the power in the past, the right to increase dues and initiation fees. (H. Rep. No. 741 on H. R. 8342, pp. 7-9, 81-82, 29-30; Conference Report (H. Rep. No. 1147) on S. 1555, p. 31; Senate Report No. 187 on S. 1555, pp. 2-10-70-72).

Article 5 (AFM Constitution) in effect calls for balloting by *Locals* not by delegates. The Act calls for a majority vote of the delegates. Title I calls for *equal* votes; since the delegates are members. The AFM Constitution gives delegates unequal voting power and thereby creates a class of powerful delegates and intra-convention discriminations which lend to the machinations of the "smoke-filled room", to intra-union political alliances and to concentration of union power in few hands.

Mathematically, a majority of the delegates at the Sixty-Sixth Convention voted against Recommendation No. 11 (Proc. 58-63). Only if the "vote of the delegates" is transmuted, multiplied or otherwise manipulated by some system of membership or other weighting (so that it is no longer recognizable as *votes of the delegates*) is it possible to say that the Sixty-Sixth Annual Convention "enacted" Recommendation No. 11. The statutory words, "a majority vote of the delegates", do not, under any fair construction, mean a system of weighted voting whereby each local casts "as many votes as it has members as per the Treasurer's book" and whereby the vote "of the delegates" is modified or masqueraded so that, because of the membership weightings, it can no longer be regarded as a vote of the delegates. The fact that unions must change their By-laws to accommodate to the Act does not alter the Congressional mandate. Scarcely a union, existing then and now, escaped that obligation in the past.

POINT III.

AFM officers in conducting the evening session which enacted Recommendation No. 11 violated their fiduciary responsibilities under Section 501(a) of the LMRDA, by disregard of the AFM Constitution and By-laws and by the manner in which they railroaded the Recommendation through the Convention. This appears from the *"Official Proceedings"* of the Convention. Therefore the result effected by the decision on appeal is just and valid, even if Petitioners' interpretation of Section 101(a)(3) of the Act were correct.

Respondent, according to the cases, has a right to urge any argument in support of the judgment below, including contentions not passed on by the Court below, and even contentions rejected by it: *Langnes* v. *Green*, 282 U. S. 531, 535-539; *Walling* v. *General Industries Co.*, 330 U. S. 545-547; *United States* v. *Ballard*, 322 U. S. 78, 88.

The facts demonstrating violation of *fiduciary responsibility* by AFM officers at and before the Convention in June, 1963 loom large in the record and occupy most of its pages. The District Court had at least pendent jurisdiction over all these matters; which the District Court did not explore, in view of the rationale of its *partial* summary judgment herein.

Title V of the LMRDA is entitled "SAFEGUARDS FOR LABOR ORGANIZATIONS." To Section 501 itself thereof, Congress gave the following title: "FIDUCIARY RESPONSIBILITY OF OFFICERS OF LABOR ORGANIZATIONS." The first sentence of §501(a) reads: "The officers, agents, shop stewards and other representatives of a labor organization occupy positions of trust in relation to such organization and its members as a group." See *Holderman* v. *Sheldon*, 204 F. Supp.,

890, affirmed 311 F. 2d 2; *Nelson* v. *Johnson*, 212 F. Supp. 283, affirmed ..... F. 2d .....; *Brooks* v. *Local 30*, 187 F. Supp. 365 (134a-136a).

It is manifestly a violation of fiduciary duty under §501(a) of the LMRDA for incumbent union officers, in arranging and influencing balloting on controversial subjects for their own purposes, to fail to comply with material and significant provisions of the union's constitution and By-laws; and to resort to the devices and strategems revealed by the record.

Petitioners' officers literally "railroaded" Recommendation No. 11 through the Convention (11a-98a) in utter disregard of the rights of members, Locals and delegates under relevant and important provisions of the AFM Constitution and By-laws, as hereinafter shown on the basis of Petitioners' own documents:

(1) The evening session was chaired by Appellant's President (who is an attorney). The record shows (34b-35b) that not one but two voice votes were called for by the Chair. Admittedly, the Chair ruled, with respect to the two voice votes, that the 'ayes" and the "nays" were of "equal response" (Proc. 58). This ruling, *ipso facto* and immediately, required application of Robert's "Rules of Order" calling for a rising vote; since no provision of the AFM Constitution or By-laws supplies a relevant rule or regulation and since Article 28, Section 2, of AFM By-laws expressly provides that Robert's Revised Manual "shall be the guide unless otherwise provided." Petitioners admitted that the Chairman did not follow the procedures prescribed by Robert's Rules of Order and AFM By-laws (30b). The Chairman himself immediately cued the roll-call vote (115a); and without pause recognized Delegate Snider, who took the cue and called for a roll-call under Article 5 of the AFM Constitution (115a).

(2) Article 5 of the AFM Constitution was itself violated: since *five Locals did not demand the roll-call vote.* Article 6, Section 2, of the AFM Constitution provides: "No member shall be permitted *to represent more than one local*, nor shall any member be permitted to act as delegate for a local *unless he is a full member in good standing in said local*" (emphasis added) (115a).

Petitioners' claim that five locals demanded a roll-call vote finds no support in the record. After saying that "any ten delegates or five locals may ask for a roll-call vote, if you are dissatisfied with the voice vote", the Chair (115a) immediately recognized delegate Snider and identified the microphone he could use. Thereupon, Mr. Snider spoke:

> "Merle Snider, Local 368, Reno, Nevada. I call for a roll-call vote. * * * I have five locals, which is required by the Constitution to ask for a roll-call vote. This will be verified by the Chair" (115a).

The Chair did not verify it. No delegates from the Locals, which Mr. Snider said he "had", rose to indicate that they had demanded a roll-call vote. Section 2, Article 6, of the AFM Constitution forbade Snider from speaking for any Local except his own. How did Mr. Snider, in the instant between (115a) the Chairman's statement (to the effect that any ten delegates or five locals could ask for a roll-call vote if "dissatisfied with the voice vote") and the Chair's recognition (115a) of Snider, have time to solicit and obtain authorizations to speak for five locals beside his own? The Chair had no reason whatever to assume, as it did (116a), that five locals had demanded a roll-call vote.

(3) The Chairman deliberately misrepresented both fact and By-law in remarks leading to or cuing the roll-call vote. Thus, he violated his duty, as trustee, to make full and

honest disclosure (115a). A delegate had risen a moment before and had said to the Chairman:

> "* * * it seems to me that a matter of such great importance as this to be placed in a voice vote is ridiculous, because it's going to be a matter of who out-yells whom. I think we should set the machinery in motion tonight or tomorrow morning for a ballot vote. This will give us the only real decision" (115a).

To this, the Chairman dishonestly replied:

> "Well, a roll-call vote is what you are referring to. Any ten delegates or five locals may ask for a roll-call vote if you are dissatisfied with the voice vote" (emphasis added).

The Chairman misrepresented in two respects. The delegate was not referring to a "roll-call vote"; he was quite obviously referring to a paper ballot vote, such as is commonly used in most union conventions. The delegate was correct in stating that only such a ballot vote would give a "real decision", in default of a rising vote and count. The Chairman was also misrepresenting when he stated that a roll-call vote could be called for after a voice vote (without a motion to reconsider), if the delegates were "dissatisfied with the voice vote." There was no basis for such a statement in the AFM Constitution and By-laws or in Robert's Rules of Order.

(4) Neither the delegates nor the other members (74a-93a) of the AFM and its Locals had ever been properly informed about the significance of the decision of the Court of Appeals rendered April 30, 1963 in the *Cutler* case (316 F. 2d 546) which created the problem the Convention was asked to solve. Indeed, the "Official Proceedings" demonstrate that, in violation of their fiduciary responsibility

under Section 501(a) of the Act, AFM officers suppressed information needed for intelligent consideration of RECOMMENDATION No. 11 (Proc. 107-112). For example, Kenin's letter of May 7, 1963, sent to all members, delegates, locals and officers shows that, instead of enlightening the delegates and members on the problem confronting them, he actually misinformed them (Proc. 88; 107-112; 74a-84a).

(5) In compiling the tally of the voting on RECOMMENDATION No. 11, the Convention improperly counted at least 26,174 votes *more than once* (73a-73b; 46a; 109a; 2b-7b; 12b-22b). The roll-call required by Article 5 of the AFM Constitution enabled the voting Locals to cast as many ballots as they have members. Thousands of members of the AFM belong to more than one Local as Petitioners admit (46a; 109a). Necessarily members thus belonging to more than one Local were counted more than once (33a ¶39-40).

(6) The "Official Proceedings" (Proc. 58-63) demonstrate by the tally of "YES" votes and "NO" votes ascribed to the various AFM Locals, that twenty-two Locals with 15,066 members improperly split their vote upon varying rationales. Neither the LMRDA nor the AFM Constitution or By-laws permit such splitting of votes. It is impossible to discover a rational explanation for some of the splittings. For example, Local 204 has a membership of 541 (Proc. 15). It was represented by three delegates (Proc. 15). In the vote on RECOMMENDATION No. 11 it cast *one* ballot for "YES" and *540* "NO" (Proc. 60).

(7) AFM officers also violated their fiduciary duties under Section 501(a) of the Act by failing to enforce Article 28, Section 21 of the AFM By-laws reading:

> "No alteration or amendment to the Constitution or By-laws (except as otherwise provided in the By-laws or ordered by a Convention) shall be made

> unless proposed in writing, *and said alterations or amendments must receive the majority vote of the delegates present* to become a law, unless otherwise provided" (emphasis added).

RECOMMENDATION No. 11 did not receive the majority vote of the "delegates present" (Proc. 58-63). Some 373 delegates voted "YES". According to the AFM, 1,176 delegates were *present* at the Convention during the vote on RECOMMENDATION No. 11 (48a). One-half of 1,176 is 588. Thus, less than one-half the delegates voted for RECOMMENDATION No. 11. Incidentally the language used in Article 28, Section 21, has an almost one-for-one correspondence with the language used in Title I of the Statute; compare "majority vote of the delegates present" with "majority vote of the delegates voting."

Thus, the Petition should be denied for either of two reasons:

One. The Record shows, largely from Petitioners' own admissions, that violations of Section 501 of the LMRDA have totally invalidated RECOMMENDATION No. 11 (including, of course, the provisions thereof which purport to increase dues and initiation fees).

Two. The Petition is premature. Respondents should be allowed to try the remaining issues raised by the Complaint (40a-41a) respecting the many violations of Section 501 of the LMRDA *indicated*, if not *established*, in the Record. These issues should first be tried before presentation of formal briefs to this Court on the theory, plainly adopted by Petitioners and *amicus curiae*, that the instant case is a quasi-class action in its significance for many other labor unions. Actually, the case is unique by reason of the

numerous breaches of fiduciary duty which characterize it. Those breaches make it unnecessary to reach the other federal questions on which Petitioners rely.

Conclusion.

The Petition for certiorari should be denied.

Respectfully submitted,

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MU 7-1950

Dated: New York, N. Y.
February 17, 1964

APPENDIX.

29 U. S. C. §501, Pub. Law 86-257; 73 Stat. 535.

TITLE V—SAFEGUARDS FOR LABOR ORGANIZATIONS

FIDUCIARY RESPONSIBILITY OF OFFICERS OF LABOR ORGANIZATIONS

Sec. 501. (a) The officers, agents, shop stewards, and other representatives of a labor organization occupy positions of trust in relation to such organization and its members as a group. It is, therefore, the duty of each such person, taking into account the special problems and functions of a labor organization, *to hold its money and property solely for the benefit of the organization and its members* and to manage, invest, and expend the same in accordance with its constitution and bylaws and any resolutions of the governing bodies adopted thereunder, to refrain from dealing with such organization as an adverse party or in behalf of an adverse party in any matter connected with his duties and from holding or acquiring any pecuniary or personal interest which conflicts with the interests of such organization, and to account to the organization for any profit received by him or under his direction on behalf of the organization. A general exculpatory provision in the constitution and bylaws of such labor organization or a general exculpatory resolution of a governing body purporting to relieve any such person of liability for breach of the duties declared by this section shall be void as against public policy.

(b) When any officer, agent, shop steward, or representative of any labor organization is alleged to have violated the duties declared in subsection (a) and the labor organization or its governing board or officers refuse or fail to sue or recover damages or secure an accounting or other appropriate relief within a reasonable time after being requested to do so by any member of the labor organization, such member may sue such officer, agent, shop

steward, or representative *in any district court of the United States or in any State court of competent jurisdiction to recover damages or secure an accounting or other appropriate relief for the benefit of the labor organization.* No such proceeding shall be brought except upon leave of the court obtained upon verified application and for good cause shown which application may be made ex parte. The trial judge may allot a reasonable part of the recovery in any action under this subsection to pay the fees of counsel prosecuting the suit at the instance of the member of the labor organization and to compensate such member for any expenses necessarily paid or incurred by him in connection with the litigation.

(c) Any person who embezzles, steals, or unlawfully and willfully abstracts or converts to his own use, or the use of another, any of the moneys, funds, securities, property, or other assets of a labor organization of which he is an officer, or by which he is employed, directly or indirectly, shall be fined not more than $10,000 or imprisoned for not more than five years, or both.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

NO. 27

AMERICAN FEDERATION OF MUSICIANS OF THE UNITED STATES AND CANADA, ET AL.,
Petitioners,

v.

EDDIE WITTSTEIN, ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIEF FOR THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS AMICUS CURIAE

INTEREST OF THE AFL-CIO

This brief *amicus curiae* is filed by the American Federation of Labor and Congress of Industrial Organizations (AFL-CIO) with the consent of the parties, as provided for in Rule 42 of the Rules of this Court.

The AFL-CIO is a federation which includes 131 national and international labor organizations, having a total of about thirteen million members. The Federation is vitally concerned with maintaining democratic procedures among all its affiliates. It is also vitally concerned with ensuring that each individual affiliate is allowed the widest latitude, consonant with guarantees of fairness for its membership, in deciding upon that particular mode of procedure best suited to its own needs and desires. Genuine democracy is served far better through a healthy diversity than through a rigid conformity in the private institutions of our free society.

The instant case presents one specific question about the latitude to be allowed labor organizations in determining the procedure for increasing membership dues. The question is important in itself, because under the decision of the court below doubt is cast on the methods now used by over half of the AFL-CIO's affiliates in securing essential revenue. The question is also important because it will enable this Court to provide guidance on how the Labor-Management Reporting and Disclosure Act of 1959, 73 Stat. 519, 29 U.S.C. §401 *et seq.*, should be interpreted in other contexts, when there is a choice between a narrow and artificial reading that will wreak havoc upon established union procedures without promoting any known congressional purpose, and, on the other hand, a sensible and realistic reading that will assure every individual union man his proper membership rights without interfering with the practices and usages freely adopted by his organization.

As the principal spokesman for organized working people in this country, the AFL-CIO wishes to submit to the Court certain data which, in our opinion, establish two critical points. First, the court below misconstrued the relevant statutory terminology by failing to appreciate its meaning as commonly understood in intraunion affairs. Secondly, the court's interpretation would force a great many inter-

national labor organizations, including a majority of the Federation's affiliates, to abandon their established procedures for increasing dues or fees or for levying assessments, despite the absence of any indication in the legislative history that Congress ever intended so unsettling a result.

ARGUMENT

Section 101(a)(3)(B) of the Labor-Management Reporting and Disclosure Act of 1959, 73 Stat. 522, 29 U.S.C. §411(a)(3)(B), provides in effect that an international union may increase individual members' dues or fees by, *inter alia*, a "majority vote of the delegates voting" at a convention of the organization. Judge Thurgood Marshall, dissenting below, and petitioners, in their brief here, have said all that needs to be said to show that as a matter of law the quoted language should properly be construed as including authorization for a procedure whereby a delegate's vote is "weighted" to reflect the number of members he represents. In view of this, we will confine ourselves to setting forth in summary fashion two items which we think confirm the soundness of petitioners' position, and which we feel are most appropriately presented by the AFL-CIO. These cover (1) congressional testimony by Federation President George Meany regarding his understanding of section 101(a)(3) of the Act, in the light of established union practices; and (2) the potential effect of the instant decision upon the voting procedures presently followed by the 131 national and international unions affiliated with the AFL-CIO.

I. Testimony By The AFL-CIO Regarding Section 101(a)(3) And Union Endorsement Of The Statutory Language Show The Landrum-Griffin Act Was Not Intended To Prohibit "Weighted" Voting By Delegates.

On June 3, 1959 AFL-CIO President George Meany appeared before a joint subcommittee of the House of Rep-

resentatives to set forth in detail the Federation's views on proposed labor legislation, including S. 1555, 86th Cong., 1st Sess. (1959), as passed by the Senate. He voiced three specific objections to section 101(a)(3) of the Senate bill, dealing with union membership dues, fees, and assessments.[1] First, certain prescribed voting methods would apply whenever dues and fees were "changed"; this was unduly broad, since safeguards for individual members would obviously not be needed when rates were decreased. Secondly, the language of the provision might be susceptible of the interpretation that international unions could change their rates only by convention action, and not by a membership referendum. President Meany added, however, that he did not think the Senate really meant to bar international unions from following the referendum procedure.

Having made this latter observation, President Meany then submitted his third criticism of the section with these comments: "If we are correct in this assumption as to what the Senate intended, *section 101(a)(3) actually permits changes in dues and assessments by every method which unions generally employ* except action by a general executive board or similar body."[2] (Emphasis supplied.)

This analysis of section 101(a)(3) received exceptionally close attention. Each of the three principal bills to come before the House, H.R. 8342, 86th Cong., 1st Sess. (1959) (the House Labor Committee or Elliott bill), H.R. 8400 (the employer-backed Landrum-Griffin bill, which was eventually passed), and H.R. 8490 (the union-backed Shelley bill), contained identical language in section 101(a)(3), and this language varied from the Senate's version so as to take account of each of the three objections leveled by President Meany.

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[1] *Hearings on Labor-Management Reform Legislation before a Joint Subcommittee of the House Committee on Education and Labor*, 86th Cong., 1st Sess. 1482, 1517-18 (1959).

[2] *Id.* at 1518.

Under the provisions of each bill's section 101(a)(3), the limitations on voting procedures would apply only when the rates of dues and initiation fees were "increased," and not when they were otherwise "changed." Under subsection (B)(ii) it was expressly provided that a vote on an international union's dues, fees, or assessments could be taken in a "membership referendum." And under subsection (B)(iii) the "executive board or similar governing body" of an international was allowed to increase dues and fees and levy assessments between conventions. Plainly, there was no desire on the part of any legislative faction to wrangle over this relatively noncontroversial provision of the bill. Adversaries on many other issues readily united in acceding to President Meany's views on this particular section.

Against this background, it seems entirely fair to regard as definitive President Meany's characterization of section 101(a)(3) as permitting (with the House modifications) dues increases and assessments "by every method which unions generally employ." No member of Congress ever challenged the accuracy of that appraisal.[3]

As the leading spokesman for American labor, President Meany was of course aware that it was an accepted practice among many unions to "weight" the votes of their delegates at conventions in accordance with the number of members they represented.[4] It is inconceivable that President Meany, either in criticizing the language of S. 1555 or later in en-

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[3] See, *e.g.*, Senator McClellan's point-by-point response to many of President Meany's other comments on title I of S. 1555. 105 Daily Cong. Rec. 9933 (June 16, 1959), 2 Leg. Hist. of the LMRDA 1294. No question was raised about President Meany's quoted estimate of the scope of section 101(a)(3).

[4] See affidavit of George Meany submitted in the District Court below (R. 110), and the figures set forth in part II, *infra*.

dorsing the Shelley bill,[5] which had language identical to section 101(a)(3) as enacted, would have acquiesced in the invalidation of the voting procedures followed at conventions by a majority of the AFL-CIO's affiliated internationals.

Furthermore, as this Court has declared, if a "word be deemed to have a peculiar connotation for those intimate with trade-union affairs, it is incumbent upon us to give the word its technical meaning," especially where, as here, the term "is an integral part of a statute whose sponsors were familiar with labor organization and labor problems and which was doubtless drawn by specialists in labor relations." *NLRB* v. *Coca-Cola Bottling Co. of Louisville*, 350 U.S. 264, 269. Such terminology as a "majority vote of the delegates," as customarily used in international constitutions, merely describes the percentage needed to adopt a measure; it does not say whether that percentage shall be a percentage of the individual delegates or a percentage of the weighted voting strength they represent. Indeed, the phrase "majority vote" in many unions refers to a per-

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[5] See 105 Daily Cong. Rec. 14351-52, 14358-59 (Aug. 12, 1959), 2 Leg. Hist. 1627-28, 1634-35; *N. Y. Times*, Aug. 7, 1959, p. 1, col. 8, p. 8, col. 3; *AFL-CIO News*, Aug. 8, 1959, p. 1, col. 5.

Section 101(a)(3)(A)(iii) of S. 1555, as passed by the Senate, spoke in terms of a "majority vote at a regular convention or a special convention***"; section 101(a)(3)(B)(i) of the three House bills spoke in terms of a "majority vote of the delegates voting at a regular convention, or at a special convention***." The phrase "of the delegates voting" was evidently inserted to make certain that the "majority" needed to adopt a measure would be determined on the basis of the delegates actually voting, and not on the basis of the entire body of delegates attending the convention, which would be a stiffer standard to meet. Plainly, this slight language change was not intended to effect such a major legal change as requiring the "majority" to be determined on the basis of the number of individual delegates rather than on the basis of the voting strength of the delegates. So drastic an alteration would have occasioned comment, and would not have been approved by the AFL-CIO when incorporated into the Shelley bill. In any event, as discussed more fully in the text, a "majority vote of the delegates" in union parlance calls for no such narrow and restrictive reading.

centage determined on *either* basis, depending on what voting procedure is being followed at a particular time. Understanding how union conventions are generally conducted will show why this is so.

As in many deliberative bodies, routine, noncontroversial matters at a convention are ordinarily handled by a voice vote. More controversial questions, resulting in a closer division of the assembly, are decided by a standing vote or a show of hands. In neither of these cases is any effort made to take account of a delegate's "weighted" voting strength. On the most important or most controversial issues, however, the usual procedure is to vote by roll-call. It is on the roll-call that those organizations providing for weighted voting proceed to tabulate the delegates' votes according to the number of members they represent. In this latter instance the phrase "majority vote of the delegates," or its equivalent, is read to mean a majority of the "weighted" voting strength of the delegates. To verify the existence of this interpretation might, in the case of some unions, require knowledge of the organizations' practices rather than merely of their constitutional provisions. But the Constitution of the AFL-CIO confirms by its very language the validity of our analysis.

Article XVII of the AFL-CIO Constitution reads as follows:

> "This constitution can be amended or altered only by the convention, by a *two-thirds vote of those present and voting, either* by a show of hands, *or*, if a roll-call is properly demanded as provided in this constitution, *by such roll-call.*"[6] (Emphais supplied.)

Article IV, section 17 of the AFL-CIO Constitution provides:

> "Questions may be decided by division or a show of hands, but a call of the roll may be demanded by 30

[6] *AFL-CIO Constitution*, art. XVII (1961).

> percent of the delegates present. *Upon such roll-call each delegate* representing affiliated national or international unions, organizing committees and directly affiliated local unions *shall be entitled to cast one vote for every member whom he represents.* Each state and local central body and national trade and industrial department shall be entitled to one vote."[7] (Emphasis supplied.)

As can easily be seen, the phrase "two-thirds vote of those present and voting," which is found in the AFL-CIO Constitution, precisely parallels the phrase, "majority vote of the delegates voting," which is found in section 101(a)(3)(B)(i) of the Landrum-Griffin Act. The AFL-CIO Constitution goes on to make plain beyond any doubt that the "two-thirds vote" may refer "*either*" to a two-thirds count determined on the basis of the number of individual delegates present and voting, "*or*," on a roll-call, to a two-thirds count determined on the basis of the number of members represented by those delegates.[8]

Section 101(a)(3)(B) of the Landrum-Griffin Act, incorporating as it does a phrase having a "peculiar connotation for those intimate with trade-union affairs," must be interpreted accordingly. A "majority vote of the delegates voting" means *either* a majority calculated in terms of individual delegates, *or* a majority calculated in terms of the voting strength reflected by those delegates, depending on how a particular organization provides that its delegates' votes shall be measured. Such an interpretation of the

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[7] *Id.*, art. IV, §17.

[8] Like the AFL-CIO, a number of international unions on a roll-call give representatives of certain constituent bodies one vote each, although delegates from affiliated unions vote the full membership they represent. This former group, which in the case of the AFL-CIO accounts for only about 260 votes out of approximately 12.5 million votes on a roll-call, has been disregarded in our discussion (and in the classification in part II, *infra*), on the ground it is *de minimis* and has no bearing on whether an organization's procedures would meet the standard required by the court below.

statutory language is consistent with the meaning which "specialists in labor relations" would be expected to convey. It does no violence to any expression of legislative intent. It comports with the unchallenged understanding of AFL-CIO President George Meany, as set forth in carefully studied and highly influential congressional testimony. And, as we shall next show, it makes it unnecessary to rewrite the freely chosen voting procedures which are spelled out in the constitutions of over half of the AFL-CIO's affiliated international unions.

II. Congressional Regulation Of Union Procedures For Increasing Dues And Levying Assessments Should Be Interpreted In Light Of Established Union Practices Allowing "Weighted" Voting By Convention Delegates.

In *Ranes* v. *Office Employees Local 28*, 317 F.2d 915, 917-18 (7th Cir. 1963), the court in discussing another problem arising under Landrum-Griffin's section 101(a)(3) took a sensible and realistic approach which we think is equally appropriate here:

> "We cannot assume that Congress was unaware of the traditional structure and dues practices of labor unions when it enacted 101(a)(3), or that Congress, being aware of the traditional structure and practices, intended by enacting that Section to strip international unions of their traditional power to control the minima and maxima of rates of dues without one word in the Committee Reports expressing that intention. On the contrary, we must assume that Congress was aware of the established structure and practices and interpret the statute in the light thereof."[9]

As can readily be demonstrated, the "traditional structure and dues practices of labor unions" encompass, for a majority of the 131 international unions affiliated with the AFL-CIO, procedures whereby the dues or fees, or the minima thereof, or the assessments, payable by individual members may be set by a vote of the delegates at an inter-

[9] Citing *Carpenters Local 1976* v. *NLRB*, 357 U. S. 93, 98-101; *Perrine* v. *Chesapeake & D. Canal Co.*, 50 U. S. 172, 187-88.

national convention in which the voting strength of each delegate is measured or "weighed," in one way or another, according to the number of members he represents. Petitioners have fully briefed the proposition that such "weighted" voting is one of the most feasible methods of ensuring a democratic reflection of the wishes of the entire membership of the union, without having a convention so large that it is both overly cumbersome and overly expensive.[10] We will limit ourselves to setting forth the statistics on the voting procedures followed by the Federation's affiliates.

AFL-CIO counsel have examined the constitutions of the 131 affiliated international organizations to determine the way each raises dues and levies assessments.[11] The results of this study are tabulated in the Appendix of this brief.[12] Five distinct voting methods are employed: (1) non-convention action—all dues, fees, and assessments, or minima thereof, payable by individual members are governed by

[10] As Judge Marshall pointed out in his dissent below, the petitioner international has a total membership of about 280,000, spread throughout local unions ranging in size from around 28,000 down to 20, and this is by no means atypical. Directly proportional representation of each local in such a union, if achieved through the number of delegates at the international convention rather than through the voting strength of the delegates, would require a convention consisting of some 14,000 delegates.

[11] Labor organizations are required by the Landrum-Griffin Act to file their constitutions with the Department of Labor. These constitutions are available for public inspection, so the accuracy of the AFL-CIO's classifications can easily be verified. As an added precaution, the classifications made by Federation counsel were submitted to all 131 affiliates for their comments or corrections in light of their own interpretations and practices.

[12] In classifying the internationals' voting procedures, certain ground rules were adopted. The only voting procedures considered were those covering financial obligations placed directly on individual members, since section 101(a)(3) of the Act deals solely with dues, fees, or assessments "payable by *members*." (Emphasis supplied.) Financial obligations imposed by internationals on their constituent locals as organizational entities were ignored. International unions which fix minimum dues or fees but leave to the

methods other than a vote of convention delegates, *e.g.*, by membership referenda or by the various local unions; (2) equal voting at a convention—each delegate has one vote; (3) membership weight at a convention—delegates vote the membership they represent, *e.g.*, a delegate representing 603 members has 603 votes; (4) directly proportional voting at a convention—delegates have a voting strength in direct proportion (sometimes ignoring fractions) to the number of members they represent, *e.g.*, a delegate representing 100 members has one vote and a delegate representing 603 members has 6 (or 6.03) votes; and (5) sliding scale voting at a convention—delegates' voting strengths vary depending on the number of members they represent, but there is a graduated rather than directly proportional relationship, *e.g.*, a delegate has one vote for the first 100 members he represents, one additional vote for the next 200, and one additional vote for each additional 300 members.

The first two of these procedures for setting dues and

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locals the setting of the exact amount were treated, however, like organizations which fix the rate at the international level, because the power to raise the minima is the legal, and often the practical, equivalent of the power to increase the rate itself. *Cf. Ranes* v. *Office Employees Local 28*, 317 F. 2d 915 (7th Cir. 1963).

The purpose of this survey, of course, was to show how many unions would have to change their existing practices should the rule of the court below be upheld. Accordingly, if either local dues or other fees (or the minima thereof) payable by individual members are set at an international convention, the international is classified so as to indicate the voting procedure which would or could be governed by the decision in the present case. Similarly, if rates can be raised or assessments levied by a separate membership referendum as well as by convention action, or by a standing convention vote with each delegate having one vote as well as by a roll-call, upon proper demand, with a weighted vote prevailing, the referendum or standing vote is disregarded and the international is categorized solely on the basis of the convention action or roll-call voting system. On the other hand, if any dues increase or assessment requires *both* a convention vote and a membership referendum, the international is classified as using non-convention action, on the ground that at least the referendum would meet the requirements of subsection (B)(ii), making it immaterial whether the convention action met the requirements of subsection (B)(i).

laying assessments would not be affected by the holding below that every delegate must have one vote when action is by convention. The last three types of procedures would be invalidated. Under the five categories just described, the AFL-CIO's 131 affiliated internationals can be classified according to their voting procedures for raising dues and levying assessments, as follows:

Voting Procedures on Finances Used by 131 AFL-CIO Affiliates

Procedure	No. of Unions
Non-Convention Action	21
Equal Voting	42
Total Unions Unaffected by *Wittstein*	63
Membership Weight	19
Direct Proportion	31
Sliding Scale	18
Total Unions Affected by *Wittstein*	68
Total All Unions	131

A total of 68 unions, or more than half the AFL-CIO's international affiliates, would thus have their voting procedures on financial issues struck down as unlawful under the ruling of the court below. Limiting consideration to the 110 internationals which decide such questions at conventions, this means almost two-thirds of the organizations would be adversely affected. In the absence of the slightest suggestion in the legislative history that Congress ever intended so devastating a result, a relatively non-controversial section of a statute should not be construed as outlawing such an accepted and concededly democratic trade union practice.[16]

[16] Even the majority of the court below recognized that "weighted voting is to all appearances the most 'democratic' method, in the sense that each member is duly 'represented,' and it is a method of voting widely recognized as fair and proper by a number of unions." *Wittstein* v. *Musicians*, 326 F. 2d 26, 29 (2d Cir. 1963).

As might be expected, an even higher proportion of the larger labor organizations use weighted voting by delegates at conventions to pass upon revenue measures. Examination of the 34 affiliated internationals having more than 100,000 members each shows the following breakdown:

Voting Procedures on Finances Used by 34 AFL-CIO Affiliates Having More Than 100,000 Members Each

Procedure	No. of Unions
Non-Convention Action	2
Equal Voting	12
Total Unions Unaffected by *Wittstein*	14
Membership Weight	6
Direct Proportion	9
Sliding Scale	5
Total Unions Affected by *Wittstein*	20
Total All Unions	34

Labor organizations relying upon various methods of weighted delegate voting to provide a fair reflection of membership sentiment, without the need for an outsized convention, include such quarter-million-member-or-over internationals as the Auto Workers, the Building Service Employees, the Communications Workers, the International Brotherhood of Electrical Workers, the International Union of Electrical Workers, the Hotel and Restaurant Employees, the Operating Engineers, and the Steelworkers. Those eight unions alone account for almost four million members, about one-third of the total strength of the AFL-CIO. Can it seriously be maintained that Congress intended, without reason,[14] without explanation, and through a provision carrying the endorsement of the President of

[14] The majority below conceded that "no particular abuses in the matter of weighted voting for such increases [in dues and fees] had been proved." *Wittstein* v. *Musicians*, 326 F. 2d 26, 30 (2d Cir. 1963).

the AFL-CIO, to strip these and other unions representing a vast contingent of American workingmen[15] of their traditional power to obtain essential operating funds through voting procedures freely chosen by those organizations, and carefully designed to secure an accurate expression of the wishes of their entire memberships?

We think not. We think section 101(a)(3) of Landrum-Griffin should be interpreted in accord with the undisputed analysis contained in President Meany's congressional testimony, in accord with the accepted meaning of its terminology in trade union circles, and in accord with the unexceptionable voting practices of the majority of the internationals comprising the AFL-CIO. The narrow, niggling reading urged by respondents, and the harsh and drastic results it would produce, are not required by the statutory language, and run directly counter to legislative history and rational policy. The phrase "majority vote of the delegates" can reasonably be interpreted as referring to a majority of the delegates' voting strength, either equal or weighted, depending on what method has been chosen by a particular organization. Common sense and a due regard for the context in which the statute was written compel the adoption of that interpretation.

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[15] The 68 international affiliates of the AFL-CIO which utilize one form or another of "weighted" delegate voting report a total membership of approximately 7,200,000. See 2 *Proceedings of the AFL-CIO Fifth Constitutional Convention* [*Report of the Executive Council*] 37-40 (1963).

CONCLUSION

For the foregoing reasons, and for the reasons set forth in the brief for petitioners, the judgment of the court below should be reversed.

Respectfully submitted,
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August 1964

APPENDIX

Voting Procedures on Finances Used by 131 AFL-CIO Affiliates[16]

Name of the Union	Non-Convention Action	Equal Voting	Membership Weight	Direct Proportion	Sliding Scale
Actors & Artistes	x				
Air Line Dispatchers			x		
Air Line Pilots			x		
Aluminum Workers					x
Asbestos Workers		x			
Automobile Workers				x	
Bakery Workers				x	
Barbers		x			
Bill Posters					x
Boiler Makers					x
Bookbinders	x				
Boot and Shoe Workers		x			
Brewery Workers			x		
Bricklayers					x
Brick and Clay Workers				x	
Broadcast Employees			x		
Building Service Employees			x		
Carpenters		x			

Name of the Union	Non-Convention Action	Equal Voting	Membership Weight	Direct Proportion	Sliding Scale
Cement Workers					X
Chemical Workers					X
Cigarmakers				X	
Clothing Workers, Amalgamated		X			
Commercial Telegraphers	X				
Communications Workers			X		
Coopers		X			
Distillery Workers			X		
Doll and Toy Workers	X				
Electrical Workers (IUE)				X	
Electrical Workers (IBEW)			X		
Elevator Constructors				X	
Fire Fighters	X				
Firemen and Oilers				X	
Flight Engineers	X				
Furniture Workers			X		
Garment Workers, United		X			

Name of the Union	Non-Convention Action	Equal Voting	Membership Weight	Direct Proportion	Sliding Scale
Glass and Ceramic Workers					x
Glass Bottle Blowers		x			
Glass Cutters	x				
Glass Workers, Flint					x
Government Employees			x		
Grain Millers				x	
Granite Cutters				x	
Hatters				x	
Hod Carriers		x			
Horse Shoers		x			
Hosiery Workers	x				
Hotel & Restaurant Employees					x
Industrial Workers, Allied					x
Insurance Workers				x	
Iron Workers		x			
Jewelry Workers		x			
Ladies' Garment Workers		x			
Lathers		x			

Name of the Union	Non-Convention Action	Equal Voting	Membership Weight	Direct Proportion	Sliding Scale
Laundry & Dry Cleaning Union			X		
Leather Goods Workers		X			
Leather Workers, United		X			
Letter Carriers				X	
Locomotive Firemen & Engineers		X			
Longshoremen		X			
Machinists	X				
Maintenance of Way Employees			X		
Marble Polishers					X
Marine & Shipbuilding Workers				X	
Marine Engineers					X
Maritime Union	X	7			
Masters, Mates & Pilots			X		
Master Mechanics		X			
Meat Cutters		X			
Mechanics Educational Society		X			
Metal Polishers				X	

Name of the Union	Non-Convention Action	Equal Voting	Membership Weight	Direct Proportion	Sliding Scale
Molders		x			
Musicians			x		
Newspaper Guild					x
Office Employees				x	
Oil Workers			x		
Operating Engineers				x	
Packinghouse Workers				x	
Painters		x			
Papermakers				x	
Pattern Makers	x				
Photo Engravers		x			
Plasterers	x				
Plumbers		x			
Porters, Sleeping Car				x	
Post Office Motor Vehicle Employees	x				
Post Office Mail Handlers	x				
Postal Clerks					x
Potters		x			
Printers & Engravers	x				
Printing Pressmen	x				

Name of the Union	Non-Convention Action	Equal Voting	Membership Weight	Direct Proportion	Sliding Scale
Pulp & Sulphite Workers				x	
Radio Association	x				
Railroad Telegraphers		x			
Railroad Trainmen		x			
Railway Carmen				x	
Railway Clerks				x	
Railway Patrolmen		x			
Railway Supervisors	x				
Retail Clerks		x			
Retail, Wholesale Union			x		
Roofers		x			
Rubber Workers				x	
Seafarers	x				
Sheet Metal Workers				x	
Shoe Workers, United				x	
Siderographers		x			
Signalmen		x			
Special Delivery Messengers					x
Stage Employees				x	

Name of the Union	Non-Convention Action	Equal Voting	Membership Weight	Direct Proportion	Sliding Scale
State, County & Municipal Employees					x
Steelworkers				x	
Stereotypers	x				
Stone Workers				x	
Stonecutters		x			
Stove Workers				x	
Street & Electric Railway Employees		x			
Switchmen		x			
Teachers					x
Technical Engineers					x
Textile Workers, United		x			
Textile Workers (TWUA)		x			
Tobacco Workers				x	
Train Dispatchers		x			
Transport Service Employees		x			
Transport Workers				x	
Typographical Union	x				
Upholsterers			x		

Name of the Union	Non-Convention Action	Equal Voting	Membership Weight	Direct Proportion	Sliding Scale
Utility Workers			X		
Wire Weavers		X			
Woodworkers			X		
Yardmasters		X			

[1] For an explanation of the method followed in preparing this chart, see notes 11 and 12, *supra*, and accompanying text.

The classification headings represent the following voting systems:

"**Non-Convention Action**"—All dues, fees and assessments, or minima thereof, payable by individual members are governed by methods other than a vote of convention delegates; *e.g.*, by membership referenda or by the various local unions.

"**Equal Voting**"—Each delegate at a convention has one vote.

"**Membership Weight**"—Delegates at a convention vote the membership they represent, *e.g.*, a delegate representing 603 members has 603 votes.

"**Direct Proportion**"—Delegates at a convention have a voting strength in direct proportion (sometimes ignoring fractions) to the number of members they represent, *e.g.*, a delegate representing 100 members has one vote and a delegate representing 603 members has 6 (or 6.03) votes.

"**Sliding Scale**"—Delegates' voting strengths at a convention vary depending on the number of members they represent, but there is a graduated rather than directly proportional relationship, *e.g.*, a delegate has one vote for the first 100 members he represents, one additional vote for the next 200, and one additional vote for each additional 300 members.

The 63 international affiliates in the first two categories would not be affected by the rule of the court below. The 68 internationals in the remaining three categories would have their voting procedures invalidated.

In the Supreme Court of the United States

OCTOBER TERM, 1964

No. 27

AMERICAN FEDERATION OF MUSICIANS OF THE UNITED STATES AND CANADA, ET AL., PETITIONERS

v.

EDDIE WITTSTEIN, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES AS AMICUS CURIAE

At its annual convention in 1963, petitioner American Federation of Musicians increased its dues by a resolution adopted by a majority of the votes cast by the delegates voting, with each delegate casting a number of votes equal to the membership of the local union he represented. The court of appeals held that the dues increase violated Section 101(a)(3) of the Labor-Management Reporting and Disclosure Act of 1959 (73 Stat. 519, 29 U.S.C. 411(a)(3)), which pro-

vides that the dues of an international union "shall not be increased * * * except [*inter alia*] * * * by majority vote of the delegates voting at a * * * convention." The court construed the statute as requiring that each delegate be allowed but one vote regardless of the number of members he represents.

While the United States has no direct responsibility for enforcement of Section 101(a)(3), the Secretary of Labor is responsible for the administration of the provisions of Title IV of the Act governing the election of union officers and thus has an immediate concern with the general policy of the Act to foster union democracy. Because in our view the decision below unjustifiably frustrates that policy, we join with petitioner in urging that the judgment be reversed.

The method of convention voting held by the court of appeals to be required by the statute—a head count of the delegates—would permit dues to be raised by delegates representing but a small minority of the membership. Membership-weighted voting, in contrast, permits such action only with the concurrence of delegates representing a majority of the members and is thus a markedly more democratic method of decision-making. Not only would it be surprising to find in a statute devoted to the cause of union democracy an insistence on the less democratic method of voting, but the legislative history—recounted in detail in petitioners' brief—is persuasive that none was intended.

The court of appeals as much as acknowledged that its interpretation did not accord with the apparent purposes of the statute but proclaimed itself forced

to that result by its inability "to perceive any other meaning attributable" to the words used in the statute (R. 185). In our view, however, the words are readily susceptible of an opposing construction. The statute permits dues to be increased "by majority vote of the delegates voting." A vote in which each delegate is allowed to cast as many votes as there are members in his local is still a "vote of the delegates," since delegates and only delegates do the voting. The requirement of only a "majority" vote of the delegates means that a simple majority of the votes cast is sufficient for the action to be taken—*i.e.*, the statute does *not* require dues increases to be passed by a two-thirds or some other super-majority vote. The limitation to a majority vote of the delegates "voting" means that the "Yea" votes need be a majority only of the votes cast, not of all the votes eligible to be cast, including those of absent or abstaining delegates. In short, the statute says only by whom the votes must be cast (delegates to a convention) and the proportion of the votes needed for passage (a majority of the votes cast by the delegates voting); it says nothing of the number of votes each delegate may be allowed to cast.

It may be said that the above interpretation, since it leaves labor organizations free to determine the weight to be given delegates' votes, would not prevent a union from adopting some wholly arbitrary distribution of voting strength. Even assuming that to be true,[1] the danger seems more fanciful than real.

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[1] We do not mean to concede, however, that there are no outer limits on the allocation of votes. Query, for example,

The provisions of union constitutions governing delegate voting strength are open covenants openly arrived at, and the jealously with which each local guards its representation makes it extremely unlikely that votes would ever be weighted on any basis other than membership. Malapportionment is much more likely to be accomplished through limiting the number of delegates and confining each delegate to one vote regardless of the size of his constituency. Whatever the reason, the fact is that there has been no history of abuse in the weighting of delegate votes and thus no reason for Congress to have limited union autonomy in that respect or to anticipate that the power will be abused. Congress's concern was that the officers alone should not have power to raise dues; it sought to ensure that there be a vote.

Whether or not the interpretation we urge is the most natural reading of the words of the statute, it is at the very least a permissible one. It is in turn the only interpretation consistent with the history and purpose of the statute, as is fully demonstrated in the petitioners' brief. It should therefore be adopted, and the judgment below should be reversed.

Respectfully submitted.

ARCHIBALD COX,
Solicitor General.

AUGUST 1964.

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whether one casting votes allocated to him on a basis other than the unit or members he represents would be voting as a "delegate" (*i.e.*, as a representative of his local or its members).

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. 27

AMERICAN FEDERATION OF MUSICIANS OF THE UNITED STATES AND CANADA, ET AL., *Petitioners*,

v.

EDDIE WITTSTEIN, ET AL., *Respondents*.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF FOR PETITIONERS

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BRIEF FOR PETITIONERS

OPINIONS BELOW

The opinion of the District Court for the Southern District of New York (R. 122-139) is reported at 223 F. Supp. 27. The majority and minority opinions of the Court of Appeals for the Second Circuit (R. 180-191) are reported at 326 F. 2d 26.

JURISDICTION

The judgment of the Court of Appeals was entered on December 18, 1963. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254 (1). This Court granted certiorari on March 9, 1964 (R. 194). 376 U.S. 942.

QUESTIONS PRESENTED

1. Does § 101(a)(3)(B) of the Labor-Management Reporting and Disclosure Act of 1959 (29 U.S.C. § 411(a)(3)(B)) forbid an international union from raising membership dues by a convention vote of delegates based upon the number of members they represent?

2. If § 101(a)(3)(B) so forbids, does it to that extent violate the First Amendment?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves § 101(a)(3)(B) of the Labor-Management Reporting and Disclosure Act of 1959, 73 Stat. 519, *et seq.*, 29 U.S.C. §§ 401 *et seq.* and the First Amendment to the United States Constitution. These are reprinted in Appendix A *infra*.

STATEMENT OF THE CASE

A. The Factual Background

Petitioner American Federation of Musicians (AFL-CIO) is an international union comprising 675 local unions in the United States and Canada with a total membership, in June 1963, of approximately 280,000 (R. 46). Petitioner Local 802 is the largest local affiliate of AFM and has approximately 28,000 members. Many locals have less than 1% of Local 802's

membership. (Official Proceedings of the 1963 Convention, Ex. B. to Scola Affidavit, pp. 7-30, hereafter cited as "Proceedings".)[1]

The representation of locals at conventions is governed by Article 5 of the Federation's Constitution.[2] Each local is entitled to one delegate for each 100 members, or major fraction thereof, but not to exceed three delegates for any one local. Upon the request of "ten delegates or five locals" there must be a roll-call vote on questions affecting a change of the constitution or bylaws; in such a vote "each Local may cast as many votes as it has members".

For example, Local 802, with 28,438 members, or 10% of the Federation's total membership, had the right to send three delegates to the June 1963 Convention,[3] and was entitled, on a roll-call vote, to cast 28,438

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[1] These Proceedings are in the full record which has been filed with the Clerk.

[2] "All Locals of this Federation of one hundred and fifty members or less shall be entitled to one delegate. All Locals shall be entitled to one delegate for each one hundred members or a major fraction thereof, not exceeding three delegates for any one Local, but each Local shall be entitled to one vote for each one hundred or major fraction thereof, but no Local shall cast more than ten votes, and the number each Local is entitled to shall be computed from the last report made on January 1st before the convention by the Local, according to the books of the Treasurer. On questions affecting a change in the laws, each Local may, upon roll call, cast as many votes as it has members, as per book of the Treasurer, A. F. of M. All laws so passed shall be referred to a convention committee consisting of the Executive Board, A. F. of M., and chairmen of all committees, who may sanction or veto same, their action to be final. Roll call shall be demandable and had under this Article on demand of ten delegates or five Locals." (R. 126)

[3] For reasons that do not appear in the record, only two delegates were present from Local 802.

votes, or 10% of the total eligible vote. Local 46, with 276 members, or .1% of the total membership, likewise could send three delegates, but on a roll-call vote, was entitled to cast 276 votes or .1% of the total eligible vote.

The June 1963 Convention was chiefly concerned with replacing the Federation's historic method of raising its major revenues. That method, a "tax" based on the earnings of traveling members, had been the subject of extensive controversy and litigation.[4] The proposed substitute known as "Recommendation No. 11" (R. 57-59), provided, in pertinent part, that effective January 1, 1964:

> "1. The Federation shall not impose dues based upon earnings of members ('taxes'). Such amendment shall apply to the 10% Traveling Surcharge Tax, the 15% Radio and Television Tax and the Theatre Defense Fund Taxes.
>
> "2. (a) Annual Federation Per Capita Dues payable by Locals to the Federation shall be $6.00 (inclusive of the Per Capita contribution for the Official Journal and the Lester Petrillo Fund).
>
> * * *
>
> "3. Federation Initiation Fees shall be as follows:
>
> If the Local Initiation Fee is $10.00 or less, the Federation Initiation Fee shall be an additional $4.00.
>
> * * *
>
> "4. Each Local shall maintain Local regular periodic dues at no less than the rates existing on June 1, 1963, plus $6.00 per annum. Such rates

[4] See *Cutler* v. *AFM*, 316 F. 2d 546 (CA 2), *cert. denied*, 375 U.S. 941, December 9, 1963. Serious questions had been raised within the Federation as to the fairness of this method of raising revenues for the Federation and its locals.

may be reduced with the consent of the International Executive Board."

After two voice votes on Recommendation No. 11, the Chairman announced that he could not make a decision, stating that "the ayes and nayes appear to be of equal response" (R. 60).

A delegate, speaking on behalf of five locals, then requested a roll-call vote (R. 60), pursuant to Article 5 of the Constitution. A roll-call vote was thereupon taken with the delegates of each local casting as many votes as the locals had members.[5] Where the delegates from a local were in disagreement, this weighted vote method gave each delegate a proportion of the votes to which the local was entitled.[6] The result of the vote was, yes: 158,068 2/3, no: 113,742 1/3. (R. 61). Recommendation No. 11 was thereby adopted pursuant to Article 5 of the Federation's Constitution. On the roll call less than one half of the delegates present and voting voted in favor of the Recommendation.

B. The Proceedings in the Courts Below

1. The District Court

On August 14, 1963 Julius Schwartz and others brought suit to enjoin petitioner Local 802 from enforcing the increase of membership dues pursuant to

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[5] For example, local No. 1 cast 1,115 votes "yes" (Proceedings, p. 58).

[6] For example, Local No. 29 was entitled to 368 votes; two delegates favored and one opposed the resolution. Thus, the votes were cast yes: 245 1/3, no: 122 2/3 (Proceedings, p. 58).

Recommendation No. 11. (R.3-24).[7] On August 23, 1963 Eddie Wittstein and others brought suit against petitioner Federation to declare Recommendation No. 11 null and void and to enjoin the Federation from putting it into effect. The complaints alleged, *inter alia*, that the method by which Recommendation No. 11 was adopted violated § 101(a)(3)(B) of the Labor-Management Reporting and Disclosure Act of 1959, (73 Stat. 519 *et seq.*, 29 U.S.C. § 401 *et seq.*, hereafter referred to as "the Act"). On motion of defendants the cases were consolidated.

Defendants moved for summary judgment, filing affidavits in support of the motion; plaintiffs filed affidavits in opposition.

On October 28, 1963 the District Court (Levet, J.) filed his Opinion, Findings of Fact and Conclusions of Law (R. 122-139). The District Court found that there was "no material issue of fact" regarding the manner, described above, by which Recommendation No. 11 was enacted. (R. 131-132). The Court then considered whether this method of raising membership dues was lawful and concluded "that the convention failed to comply with the mandatory provisions of Title 29 U.S.C. § 411(a)(3)(B)(i) [§ 101 (a)(3)(B)(i) of the Act] and that as a result I am forced to declare the action increasing dues to be void." (R. 138).

The Court thereupon granted judgment to plaintiffs in both actions "declaring that that portion of Recommendation No. 11 increasing the per capita dues of Federation members was invalidly enacted under 29

[7] The Schwartz complaint stated an additional claim which was ultimately dismissed and is not relevant to the issues before this Court. The allegations presently involved are stated in the "Second Separate and Distinct Claim" (R. 14-22).

U.S.C. § 411(a)(3)(B)(i)", and enjoining the defendants from carrying the same into effect.[8] Judgment was entered in *Wittstein* on October 30, 1963 (R. 143-144) and in *Schwartz* on November 1, 1963 (R. 140-141).[9] On the same dates, the respective defendants filed notices of appeal.

2. The Court of Appeals

The appeal was expedited in the Court of Appeals, argument being held on November 20, 1963, before Judges Medina, Waterman and Marshall. On December 18, the Court by a 2-1 vote affirmed the judgment of the District Court.

The Court held that the procedure by which the roll-call vote was taken was proper and, indeed, required under the union's by-laws. It further agreed with the unions that

> "the weighted voting is to all appearances the most 'democratic' method, in the sense that each

[8] Subsequently, the District Court entered an order of clarification (not included in the present record) which explained that it was enjoining only the collection of dues and initiation fees from members pursuant to Recommendation No. 11, but was not invalidating the provision that each local must pay $6.00 annually to the Federation for each member of the local, because the Act does not deal with payments from local unions to internationals. Cf. *Ramos* v. *Office Employees*, 317 F. 2d 915 (CA 7).

At its June 1964 Convention, the Federation passed by overwhelming voice vote a resolution re-enacting the dues and initiation fee increases effective July 1, 1964. The outcome of this case will determine the legality of the increase for the period of January 1 through June 30, 1964, as well as the legality of the voting procedure for future conventions.

[9] In the *Schwartz* action the Court certified under Fed. R. Civ. P. 54 (b) that final judgment could be entered on this cause of action although no judgment had been entered with regard to the other, unrelated, cause of action.

> member is duly 'represented,' and it is a method of voting widely recognized as fair and proper by a number of unions. Not only are similar provisions to be found, with some variations of detail, in many representative union constitutions or by-laws, but it may fairly be said that the passage of the Labor-Management Reporting and Disclosure Act of 1959 was not brought about by any abuses found to have flourished under the aegis of the weighted voting system." (R. 184-185).

The Court then stated what it took to be "the simple central issue":

> "in the context of section 101(a)(3)(B), 29 U.S.C., Section 411(a)(3)(B), do the words 'by majority vote of the delegates voting at a regular convention' mean one vote for each delegate?" (R. 185).

This question was then answered in the affirmative:

> "As we are unable to perceive any other meaning attributable to the phrase, we hold: that each delegate at the 1963 Convention was entitled to one vote, no more, no less; that the resolution as passed was void, as violative of the plain requirements of the Act; and that the judgments appealed from must be affirmed." (*id.*)

On December 23, Judge Marshall filed his dissenting opinion, (R. 187-191). He disagreed with "the conclusion that the words 'by majority vote of the delegates voting' were intended and must be construed to invalidate this common and concededly fair method of delegate voting at union conventions." (R. 187). His own conclusions, based on a thorough analysis of the legislative history, were stated as follows:

> "It seems to me clear that Congress intended merely to assure that dues increases could not be imposed by irresponsible or arbitrary union

leaders not answerable in any way to the membership at large. It did not set out to dictate to unions a particular method for voting by delegates at national conventions, and, especially, did not have any desire to foreclose national unions from giving more weight to their larger locals on this question. Under the majority's interpretation of this provision, the only way a national union could do this, and still give even small locals at least one delegate, would often be to increase the number of delegates and the expense of holding conventions, out of all manageable proportions. * * *

"In summary, then, I am most reluctant to employ the 'plain meaning' rule here as a means of preventing the use of a perfectly normal and accepted means of voting at union conventions, especially since there is no evidence that Congress felt this method was subject to any abuse whatsoever. It is noteworthy that none of the Congressmen and Senators who discussed the bill ever adverted to this problem, or indicated in any way that a change in the practice was desirable. The same is true of the many commentators who have exhaustively analyzed the provisions of the Act, from every possible standpoint. The term 'majority vote of the delegates voting' is susceptible to a construction which would allow delegates' votes to be weighed in accordance with the strength of the different locals they represent. We ought to accept that construction, and reverse the summary judgment herein." (R. 190-191).

SUMMARY OF ARGUMENT

I.

Section 101(a)(3)(B)(i) of the Act provides that an international union may raise minimum membership dues "by majority vote of the delegates voting at a regular convention * * *." The Court of Appeals held that Congress by this language decreed that international unions could lawfully raise dues only if each delegate had "one vote, no more, no less". (R. 185) It thereby outlawed the practice of many unions to weight the vote of delegates in proportion to the number of members they represent. This result is contrary to the language of § 101(a)(3)(B)(i), its legislative history and the evidence from other provisions of the statute, and defeats the statute's universally conceded objective to promote union democracy.

A. The roll-call vote by which the AFM adopted Recommendation No. 11 complied quite precisely with § 101(a)(3)(B)(i): It was a "majority vote"—more than one-half of the total 271,811 votes cast were in favor of Recommendation No. 11; the "vote" was that "of the delegates" who were "voting at a regular convention."

The court below treated the phrase "a majority vote of the delegates voting" as if "majority" modified "delegates." This reading renders the word "vote" entirely superfluous. The court's construction would be the more natural only if the Act had been worded "a majority of the delegates voting * * *." Petitioners' view—that Congress authorized unions to adopt their own form of vote, requiring only that a majority of the votes be cast in favor of the increase—gives full effect to all the words. "Vote" describes what is to be counted to determine a majority; "of the dele-

gates" describes who is to cast the votes. Thus, Congress mandated that the votes may be cast only by delegates and that a majority of those votes must be in favor of the dues increase. But just as Congress left each union free to determine by its bylaws the number of convention delegates, so did it allow them to determine the number of votes those delegates could cast. If Congress had desired to enact the strict formula—one delegate, one vote—it could readily have said so by providing that "each delegate shall be entitled to one vote." Compare § 401(e) which requires that in certain union elections "each member shall be entitled to one vote."

B. Section 101(a)(3) is part of Title I of the Act's "Bill of Rights of Members of Labor Organizations". No bill of rights was in the bill reported to the floor by the Senate Labor Committee, but such a provision was adopted by the Senate on an amendment by Senator McClellan. The Senate thereafter adopted a substitute Title I which had been offered by Senator Kuchel and passed the bill with § 101 (a)(3) of Senator Kuchel's substitute regulating the increase of membership dues.

When the Senate bill was considered by a Joint Subcommittee of the House Committee on Education and Labor, AFL-CIO President George Meany criticized the Bill of Rights provision because of its excessive regulation of internal union affairs. He expressly objected that § 101(a)(3) of S. 1555, if read literally, would have prevented international unions from changing dues by mail ballot referendum. He added that,

> "* * * actually we do not think that the Senate really meant to bar international unions from following this procedure. * * * If we are correct in this assumption, as to what the Congress wanted,

> Section 101(a)(3) actually permits changes in dues by every method which unions generally employ except action by a general executive board or similar body. * * *"

He then urged that the House amend the bill to permit international executive boards to raise union dues, where authorized by their union bylaws. President Meany's statement that the Senate bill would not forbid any of the accepted methods of raising dues except by the international executive board was not disputed by anyone, including Senator McClellan, its sponsor, who replied in detail to President Meany's criticism of Title I. The committee responded fully to President Meany's criticism by providing in the bill it referred to the House that dues could be increased by referendum [§ 101(a)(3)(B)(ii)] and by international executive boards, if authorized by their bylaws, until the next convention [§ 101(a)(3)(B)(iii)]. The committee's action demonstrates that it desired the widest latitude for unions to prescribe their own rules for raising dues as long as they allowed membership participation. It makes no sense whatsoever to assume that the House committee would permit dues increases to be made by an executive board but not by a convention vote at which all members were fairly represented.

Because § 101(a)(3) of all three bills which were considered on the House floor contained identical language—incorporating the changes urged by President Meany—it was only briefly mentioned in floor debate. Representative Griffin observed generally that it "guarantees to union members, subject to reasonable rules and regulations, * * * that their dues and intiation fees will not be increased arbitrarily * * *."

This history confirms the view of dissenting Judge Marshall, "that Congress intended merely to insure that dues increases could not be imposed by irresponsible or arbitrary union leaders not answerable in any way to the membership at large" (R. 190). As the Seventh Circuit said,

> "The protection of the rights of union members is the purpose of 101(a)(3). Unless the provisions of subsection (B) are meaningless, Congress has said that that purpose is served when union members have representation at the council table where dues structures are changed." *Raines* v. *Office Employees,* 317 F. 2d 915, 918.

The majority of the Court of Appeals pointed to nothing in the legislative history to suggest a broader purpose. Nor could it have done so. There is not a word in the legislative history which even remotely suggests that any person considered that weighted voting at conventions was an evil. Indeed, the legislative history demonstrates that Senator McClellan, the sponsor of Title I and the author of the language which became § 101(a)(3) of the Act, believed that weighted voting in international conventions was the most desirable system. On the basis of his committee's investigations, he believed that legislation "designed to insure fair and equal representation of constituent units" was necessary. Accordingly, Section 104(2) of S. 1137, the bill which he originally introduced, would have *required* that the voting strength of convention delegates be proportionate to the size of their constituency. It is unthinkable that Senator McClellan, a prime mover behind the enactment of § 101(a)(3), would have intended thereby to *forbid* the weighted voting which he believed to be the most desirable procedure.

C. The Court of Appeals' construction attributes to Congress a legislative purpose inconsistent with the other provisions of the Act. Although § 101(a)(1) guarantees members equal rights regarding many internal political procedures, § 101(a)(3) as construed below would prohibit equality of representation in an international convention, the highest legislative council of the union. Equality of members would thereby be sacrificed to achieve equality of delegates, although every word of Title I—including its heading—proclaims that Congress was solely concerned with protecting the rights of members as members and not as delegates or officers or employees.

In Title IV of the Act, which contains minute regulations of elections of union officers, Congress permitted election of officers at union conventions by weighted voting. Section 401(f) requires only that "the convention shall be conducted in accordance with the constitution and bylaws of the labor organizations insofar as they are not inconsistent with the provisions of this Title." The Secretary of Labor, who is charged with the administration of Title IV, has interpreted it as leaving unions free to determine their own systems of representation at conventions. Congress was well aware that these systems included weighted voting at conventions. Among the sources considered in drafting Title IV were studies describing in detail union election procedures, including weighted voting.

The court below plainly erred in stating that Title IV was irrelevant in construing Title I. The text and history of the statute show that Congress was particularly concerned with union elections, and closely regulated them. It cannot be assumed that Congress, having allowed weighed voting in union elections, prohibited

such voting for raising dues in a provision which was designed only to assure membership participation.

D. The Court below acknowledged that the purpose of the Act was "to insure union democracy and that the intended beneficiary of the provisions of the Act is the union member." And it conceded that the Federation's method of weighted voting "is to all appearances the most democratic method since each member is duly represented" and is a method widely recognized as fair and proper by a number of unions." The court further conceded that the statute was not enacted because of any abuses found under the weighted voting system. The court's only effort to justify its decision in the face of those concessions was its totally unsupported statement that "Congress intended to prevent future skulduggery of every possible character in the fertile field of increasing dues". This assertion was mere speculation. The dissenting Judge could

> "find no support for the majority's suggestion that dues increases are a particularly 'fertile field' for 'skulduggery,' to which an especially strict standard should be applied." (R. 188)

The decision below conflicts not only with the objective of the statute to promote union democracy but also with the closely related objective to preserve established union procedures and practices as far as possible. Congress interfered with the existing union bylaws only where demonstrated past abuses established a compelling need. For, as recognized in the testimony of Secretary of Labor Mitchell and others, these union rules are the product of the very self-government which the Act is designed to foster.

II.

Under the decision below, union members are forbidden to raise their own dues by a procedure which, in the Court of Appeals' own words, "is to all appearances the most democratic method, in the sense that each member is duly represented." As so construed, § 101(a)(3)(B)(i) constitutes an unprecedented interference with the self-government of union members in violation of the members' rights to free association as guaranteed by the First Amendment.

It is now entirely beyond dispute that the freedom of assembly protected by the First Amendment encompasses the right of association. This, of course, includes the right of workers to form labor unions. *Railroad Trainmen* v. *Virginia Bar*, 377 U.S. 1, 8; *Amalgamated Utility Workers* v. *Consolidated Edison Co.*, 309 U.S. 261, 265. Since an organization without rules is a mere mob, the right of self-organization must mean that those who join in common cause *themselves* prescribe the rules by which their organization exists and functions. If Government had unfettered power to fix the rules by which organizations may make decisions it could control the substance of those decisions and paralyze the organization. This Court has recognized that freedom of religion implies the right of self-government of religious organizations. *Kedroff* v. *St. Nicholas Cathedral*, 344 U.S. 94, 116, reaffirming *Watson* v. *Jones*, 13 Wall. 679. Freedom to join other private associations likewise encompasses the right of self-government.

While future cases may require a balance between the right of free association and the public interest in regulation of internal union affairs, the constitutional

question here is much simpler. For, as construed by the court below, § 101(a)(3)(B)(i) outlaws long-recognized union procedures without advancing any legislative purpose. This Court has repeatedly held that government may encroach on personal liberties such as freedom of association "only upon showing a subordinating interest which is compelling." *Bates* v. *Little Rock*, 361 U.S. 516, 524. See also, *N.A.A.C.P.* v. *Alabama*, 377 U.S. 288 and cases cited *id.* at 307-308. Even if § 101(a)(3) may constitutionally be applied to prohibit the raising of dues without any membership participation, it cannot constitutionally forbid a system which allows such participation and which is concededly democratic.

ARGUMENT

I. THE FEDERATION'S 1963 CONVENTION COMPLIED WITH § 101(a) (3).

A. The Language of § 101(a)(3)(B)(i) Does Not Forbid Weighted Voting in Conventions.

Section 101(a)(3) of the Labor-Management Reporting and Disclosure Act of 1959 prescribes the procedures by which labor organizations[10] may raise minimum dues and other assessments payable by members. § 101(a)(3)(A) sets forth the methods available to a local labor organization. The permissible methods by which an international union may raise minimum membership dues (payable to its locals or directly to itself) are enumerated in § 101(a)(3)(B) as follows:

> "(i) by majority vote of the delegates voting at a regular convention, or at a special convention of such labor organization held upon not less than thirty days' written notice to the principal office of each local or constituent labor organization entitled to such notice, or
>
> (ii) by majority vote of the members in good standing of such labor organization voting in a membership referendum conducted by secret ballot, or
>
> (iii) by majority vote of the members of the executive board or similar governing body of such labor organization, pursuant to express authority contained in the constitution and bylaws of such labor organization: *Provided*, That such action on the part of the executive board or similar governing body shall be effective only until the next regular convention of such labor organization."

[10] Section 101(a)(3) excepts "a federation of national or international labor organizations" such as the AFL-CIO.

The legality of the roll-call vote by which the 1963 international convention raised the minimum dues payable by Federation members to their locals must, of course, be determined under (i). Specifically, the question is whether § 101(a)(3)(B)(i) permits international conventions to raise minimum membership dues by a vote in which the voting strength of each delegate is based on the number of members he represents. Relying exclusively on the language of § 101(a)(3)(B)(i) the Court of Appeals answered this question in the negative:

> "As we are unable to perceive any other meaning attributable to the phrase, we hold: that each delegate at the 1963 Convention was entitled to one vote, no more, no less; that the resolution as passed is void, as violative of the plain requirements of the Act". (R. 185).

The conclusion of the Court of Appeals that one delegate, one vote, is the only formula permitted by § 101(a)(3)(B)(i) was not supported by analysis of its language. There was no discussion of the meaning of the individual words or of the grammatical construction of the phrase. Nor did the Court consider the possibility—which we submit represents the congressional will—that the form of vote be determined by the union bylaws, so that "one delegate, one vote" is merely one of several permissible methods of voting. Indeed, while the language is not free from ambiguity and while, in any event, statutes cannot be properly construed merely by inspecting the words of a single phrase, a careful examination of the text reveals that the roll-call vote complied quite precisely with § 101(a)(3)(B)(i) ("a majority vote of the delegates voting at a regular convention . . ."). It was a "majority vote"—more than one half of the total 271,811 votes cast were in favor

of Recommendation No. 11; the "vote" was that "of the delegates" who were "voting at a regular convention".

A technical parsing of the text would require the identification of the noun which is modified by the adjective "majority". The Court below treated the phrase as if "majority" modifies "delegates", a reading which renders the word "vote" entirely superfluous. The Court's construction would be the more natural only if the Act had been worded "a majority of the delegates voting * * *". Our view, by contrast, gives full effect to both the word "vote" and the phrase "of the delegates". "Vote" describes what is to be counted to determine a majority. "Of the delegates" describes who is to cast the votes. Thus, Congress mandated that the votes at an International convention may be cast only by delegates and that a majority of those votes must be in favor of the dues increase. But just as Congress left each union free to determine by its bylaws the number and qualification of convention delegates, so did it allow them to determine the number of votes those delegates could cast.

This construction "imputes to Congress a surer grammatical touch than does the alternative interpretation" (Cf. *Flora* v. *United States*, 362 U.S. 145, 150), for it gives the word "vote" full effect. "This Court naturally does not review congressional enactments as a panel of grammarians; but neither [does it] regard ordinary principles of English prose as irrelevant to a construction of those enactments". *Id.* The Court below was thus plainly shortsighted when it was "unable to perceive any other meaning attributable to the phrase". (R. 185). If the Court had analyzed the language more carefully, it would have seen that a

reading which permits weighted voting is not only possible, but grammatically preferable. If the Congress had desired to enact the rigorous formula that "each delegate was entitled to one vote, no more, no less" it could readily have said so by providing that "each delegate shall be entitled to one vote". That is the language which it used in § 401(e), when it provided that in elections required to be by secret ballot[11] of the membership "each member shall be entitled to one vote".

A closely related problem has arisen in cases interpreting the words "majority of the stockholders" as used in statutes, corporate bylaws, and voting agreements. In these early cases the courts have held, almost without exception, that this phrase means a majority of the stockholders in interest, that is, the holders of a majority of the shares. *State ex rel. Mitchell* v. *Horan*, 22 Wash. 197, 60 Pac. 135; *Weinburgh* v. *Union St. Ry. Adv. Co.*, 55 N.J. Eq. 640, 37 Atl. 1026; *Seward* v. *American Hardware Co.*, 161 Va. 610, 171 S.E. 650; *Bank of Los Banos* v. *Jordan*, 167 Cal. 327, 139 Pac. 691; *Fredricks* v. *Pa. Canal Co.*, 109 Pa. 50, 2 Atl. 48. *Toledo Traction, Light & Power Co.* v. *Smith*, 205 Fed. 643 (N.D. Ohio). *Contra: Smith* v. *Iron Mountain Tunnel Co.*, 46 Mont. 13, 125 Pac. 649. The *Toledo Traction* case strikingly illustrates the parallel between our case and the stockholder cases:

> "* * * We are aware that courts ought not to disregard the plain meaning of terms merely to avoid convenience, but it is equally a vital rule of construction that if possible, an interpretation should be given which will avoid manifest absurdities.
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> * * *

[11] Under §§ 401 (b) and (d) of the LMRDA elections of officers of local and intermediate bodies must be by secret ballot.

"No reason appears why in amending regulations there should prevail a different representation from that required when other important business is to be enacted.[12] Our conclusion is that every consideration requires that, when an attempt is made to change the regulations in a corporation not affected by Section 8638, the change can be only effected by the assent in writing of those stockholders who own ⅔ of the shares of stock, and that the word 'stockholders' in Section 8704 must be construed as if reading '⅔ of the stockholders in interest'. This same Section provides that at a meeting called for the purpose, a majority of the stockholders may change the regulations. This provision renders the absurdity all the greater, if the representation is to be per capita, rather than by extent of holdings.'"[13]

* * *

"It is said that this statute is vicious, in that it affords an opportunity, if so construed, to oppress the minority. That may be, but minorities in corporations have always the court's protection against the tyranny of the majority and it would seem that the oppression of the minority by the majority is not likely to be as mischievous to the corporation itself as if the conditions were reversed.[14] Our construction is in sympathy with the tenor of judicial decision wherever the question has been raised." (205 F. Supp. at 656-658, footnotes supplied.)

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[12] Similarly, in the LMRDA Congress plainly did not require "one delegate, one vote" for the conduct of other union business, notably the election of officers which was otherwise elaborately regulated. See the discussion at pp. 38-43, *infra*.

[13] Even as the basis of representation in a corporation is the amount of stock held, so the basis of representation within a union is the number of individual members.

[14] Compare Senator McClellan's views in proposing S. 1137, discussed at pp. 33-34, *infra*.

Contrary to the unexplained assertion of the Court below (R. 185), the stockholder situation provides an informative analogy in construing § 101(a)(3). The analogy between the rights of shareholders under existing law and those of union members which were to be protected was explicitly drawn in the debates. In discussing Title I of the Act, Senator Kuchel said, "The union member will receive statutory protection for his rights as a member in much the same way that a stockholder in a business corporation is protected by law in his rights as a stockholder."[15] The shareholder cases, like the present case, involved the allocation of legislative power among the members of an organization. The courts there eschewed a literal approach and took notice of "the policy of the state law" (*Toledo Traction, Light & Power Co.* v. *Smith*, *supra*, at 657) and "the common if not universal, practice of allowing voting by shares in private business corporations which * * * obtains generally throughout the United States" (*Weinburgh* v. *Union St. Ry. Adv. Co.*, *supra*, 37 Atl. at 1028). They accordingly held that the legislative intention clearly was to require a majority in interest rather than in mere number of stockholders.

In the instant case, as we have pointed out, the language of § 101(a)(3)(B)(i) does not require the concurrence of a majority of the delegates without regard to the number of members they represent. It is thus all the more appropriate here to take into account the

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[15] 105 *Cong. Rec.* 16760, 2 *Legislative History of the Labor-Management Reporting and Disclosure Act of 1959* p. 1373 (Gov't. Printing Office, 1959, hereafter referred to as "*Leg. Hist.*") See also 105 *Cong. Rec.* 6717, 2 *Leg. Hist.* 1230. *Cf.* § 501(b) of the Act which allows members to bring the equivalent of stockholder derivative suits.

policy embodied in the Act and the traditional practices of labor unions in the United States. As we shall show, those factors, as well as the legislative history of § 101(a)(3), all point to the conclusion that Congress did not intend to prohibit the use of weighted voting at union conventions to increase dues.

B. The Legislative History of § 101 (a)(3) Requires Rejection of the Court of Appeals' Construction.

1. The Legislative History of § 101 (a)(3).

a. *The Senate.*

The general background of those provisions of the Labor-Management Reporting and Disclosure Act of 1959 which deal with the relationship between unions and their members (Titles I-VI of the Act) are well known and can be briefly stated. Under the chairmanship of Senator McClellan, the Select Committee on Improper Activities in the Labor or Management Field (hereafter the McClellan Committee) held extensive and highly publicized investigations of union racketeering and corruption from 1957 to 1959. In 1958 the Senate passed the Kennedy-Ives Bill[16] which would have required reporting and disclosure of union financial transactions, regulated the imposition of trusteeships on subordinate unions and prescribed procedures for the election of officers.[17] The Kennedy-Ives Bill died in the House.

On January 29, 1959 Senator Kennedy introduced S. 505[18], which was a modified version of the Kennedy-Ives Bill. S. 505 had no provision relating to the increase of union membership dues. However, on February 19 Senator McClellan introduced S. 1137.[19],

[16] S. 3974, 85th Cong., 2nd Sess. (1958).

[17] See Sen. Report No. 1684, 85th Cong., 2nd Sess. (1958).

[18] 1 *Leg. Hist.* 29-79.

[19] 1 *Leg. Hist.* 260-329.

Title I of which was entitled "Rights To Be Guaranteed in Charters of Labor Organizations". This is the origin in the 86th Congress of what became Title I of the Act, the "Bill of Rights of Union Members". Section 101(5) of S. 1137[20] guaranteed "Freedom From Arbitrary Financial Exactions". S. 1137 contained another provision of direct relevance to the present case: § 104(2) would have *required* some form of weighted voting at international conventions.[21] However, the bill which was reported by the Senate Labor Committee after hearing (S. 1555) contained no Bill of Rights provision. Accordingly, during floor debate on April 22 Senator McClellan objected that it was inadequate. He offered as an amendment "Title I, Bill of Rights of Members of Labor Organizations."[22] Section 101(a)(4) of this amendment was entitled "Freedom From Arbitrary Financial Exactions"; Section 101(a)(4)(A)(ii) is the direct antecedent of § 101(a)(3)(B) as enacted.[23] It provided that international labor organizations were permitted to raise dues only by:

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[20] 1 *Leg. Hist.* 269.

[21] 1 *Leg. Hist.* 278. This provision is set forth and discussed at pp. 33 to 35, *infra*.

[22] 105 *Cong. Rec.* 6475, 2 *Leg. Hist.* 1102.

[23] Section 101(a)(4)(A)(i) prescribed the methods by which a local labor organization could raise membership dues; it is the predecessor of § 101(a)(3)(A) as enacted. Section 101(a)(4)(B) of the McClellan amendment curtailed the amount which a union could charge as an initiation fee; no provision was enacted on this subject. Senator McClellan explained the reason for his proposal as follows:

> "In other words, the dues or the initiation fees cannot be increased, as they have been in certain instances. For example, if certain jobs come along, the initiation fees are hiked up. Some of the new members get the new jobs, and the old members who have been members for a long time, get no assignment to work. That has happened in my State, and it is happening in other States, too. It is not right; it is wrong." 105 Cong. Rec. 6477, 2 *Leg. Hist.* 1104.

> "majority vote of the delegates present at a general meeting of duly chosen delegates held after not less than thirty days' written notice to the principal office of each local or constituent labor organization entitled to such notice, in the case of a national or international labor organization."

Senator McClellan's amendment was adopted 47 to 46, and a motion to lay on the table a motion to reconsider was carried with the Vice-President breaking a 45 to 45 tie.[24] Two days later Senator Kuchel introduced his substitute which he stated "would clean up what we adopted the other night",[25] referring to the McClellan amendment. Section 101(a)(3) of Senator Kuchel's proposed amendment was a substitute for Senator McClellan's § 101(a)(4). Senator Kuchel stated that the language of his § 101(a)(3) "was taken almost verbatim from that part of the McClellan amendment which was applicable, except that we eliminated the so-called 75% initiation fee".[26] Section 101(a)(3)(B)(ii) of the Kuchel amendment read as follows:

> "in the case of a national or international labor organization, other than a federation of national and international organizations, by majority vote at a regular convention or a special convention held after not less than thirty days' written notice to the principal office of each local or constituent labor organization entitled to such notice."[27]

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[24] 105 *Cong. Rec.* 6493, 2 *Leg. Hist.* 1119.

[25] 105 *Cong. Rec.* 6697, 2 *Leg. Hist.* 1224. He stated that such technical amendments were necessary because of the circumstances of the adoption of the McClellan amendment. *Id.* at 1229.

[26] 105 *Cong. Rec.* 6719, 2 *Leg. Hist.* 1232.

[27] 1 *Leg. Hist.* 519-520.

This language leaves no doubt that any majority vote at a convention would be a lawful method of raising dues. The Kuchel amendment was adopted without further discussion of its § 101(a)(3) and on April 25 S. 1555 passed the Senate with the Kuchel substitute as its Title I.[28] While the House Committee returned to the simpler formulation of the McClellan provision in drafting what became § 101(a)(3)(B) of the Act, its efforts, as we now show, were designed to expand rather than to narrow the permissible methods of raising union dues.[29]

b. *The House*

On March 4, 1959 a Joint Subcommittee of the House Committee on Education and Labor began hearings on various bills relating to labor-management reform.[30] After the Senate passed S. 1555 it became the focus of testimony. Several representatives of the labor movement testified in opposition to the Bill of Rights provision of the Senate bill because of its excessive regulation of internal union affairs.[31] AFL-CIO President

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[28] 1 *Leg. Hist.* 516-585.

[29] Indeed, Senator Kuchel subsequently observed that the House bill was the same as his, a view in which he was confirmed by Senator Goldwater and Representative Griffin (see pp. 30 to 31, *infra*).

[30] Hearings Before a Joint Subcommittee of the Committee on Education & Labor, House of Representatives, 86th Cong., 1st Sess., on H.R. 3540, H.R. 3302, H.R. 4473, and H.R. 4474 and Related Bills Regarding Labor-Management Reform Legislation (hereafter cited as "House Hearings").

[31] L.N.D. Wells, Esquire, House Hearings, pp. 994 *et seq.*; Joseph Curran, President, National Maritime Union, *id.* pp. 1323 *et seq.*; Albert J. Hayes, President, International Association of Machinists, *id.* pp. 1373 *et seq.*; George Meany, President of the AFL-CIO, *id.* pp. 1474 *et seq.*

George Meany criticized § 101(a)(3) of the Senate bill on the ground that it was "unduly specific and in consequence [would] unwarrant[ed]ly straightjacket unions".[32] He objected that this provision, if read literally, would have prevented international unions from changing dues by a mail-ballot referendum.[33] However, he added:

> "actually we do not think that the Senate really meant to bar international unions from following this procedure. We think that this is simply one more illustration of the difficulties inherent in the bill of rights approach. If we are correct in this assumption, as to what the Senate intended, *Section 101(a)(3) actually permits changes in dues by every method which unions generally employ except action by a general executive board or similar body.* There is absolutely no reason why an international union should not have the power, by its constitution or convention action, to delegate to its executive board the authority to impose assessments in case of financial urgency without the necessity of going to the expense of calling a national convention."[34]

The House Committee responded fully to President Meany's criticism. It provided that dues could be increased by referendum and by international executive

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[32] House Hearings, p. 1517. Senator McClellan, in a written statement filed to supplement his testimony before the House Committee, replied specifically to this criticism. He stated:

> "The bill of rights provides minimum, not maximum standards. Section 103 specifically preserves any membership rights broader than those provided in the bill of rights." 105 *Cong. Rec.* 10902, 2 *Leg. Hist.* 1294.

[33] *id.* at 1517-1518.

[34] *id.* at 1517-1518 (emphasis supplied).

boards.[35] President Meany also pointed out that the Senate version would have affected reduction of dues as well as increases. The bill as redrafted also complied with this criticism. These revisions were embodied in the Committee (Elliott) Bill (H.R. 8342)[36] and, in identical language, in the Shelley (H.R. 8490)[37] and Landrum-Griffin (H.R. 8400)[38] Bills. It is this language which was enacted as § 101(a)(3).

President Meany's testimony and the House Committee's reaction to that testimony are most revealing. President Meany's statement that the Senate bill did not forbid any of the accepted methods of raising dues,[39] except by the executive board, was not disputed by anyone although this testimony was obviously given careful attention both by the Committee and by Senator McClellan, the sponsor of Title I, who replied in detail thereto. Moreover, and most important, the House Committee's action conclusively demonstrates that it desired the widest latitude for unions to prescribe their own rules for raising dues as long as those rules allowed membership participation. It defies all reason to assume that the House Committee would permit dues increases to be made by the executive board but not by a convention vote in which all members were fairly

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[35] This authorization was limited to international executive boards who were authorized to raise dues by their unions bylaws and with the proviso that such increase would be effective only until the next international convention (§ 101 (a)(3)(B)(iii) of the Act).

[36] 1 *Leg. Hist.* 697-698.

[37] 1 *Leg. Hist.* 876-877.

[38] 1 *Leg. Hist.* 629-630.

[39] The practice of many unions to utilize weighted voting was presumably known to the House Committee. See *Ranes* v. *Office Employees*, 317 F. 2d 915, 917-18 (CA 7) and discussion at pp. 40-41, *infra*.

represented. Additionally, the fact that the Shelley Bill, which was supported by labor, contained the precise language which was enacted demonstrates that that language could not have the purpose which the Court below assigned to it. The labor movement would hardly have sponsored or supported legislation designed to outlaw the traditional democratic practices of scores of international unions.

The House Committee Report on the Elliott Bill, discussing Title I, stated merely that one of its provisions related to the members' "right to participate and decide upon the rate of dues, initiation fees and assessments."[40] Since § 101(a)(3) of all three bills before the House contained identical language, it was given only scant attention in floor debate. Representative Griffin observed generally that "the bill of rights in our substitute is essentially the bill of rights in the form passed by the other body. It guarantees to union members subject to reasonable rules and regulations, * * * that their dues and initiation fees will not be increased arbitrarily * * *."[41]

c. *The Conference*

In the Senate-House Joint Conference Committee, § 101(a)(3) again received relatively little comment. The few statements that were made while the bill was in conference reflected the consensus that the House version of § 101(a)(3) differed from the

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[40] House Rep. No. 741 on H.R. 4332, p. 7, 1 *Leg. Hist.* 765. In their expression of supplementary views, Representatives Elliott, Green, Thompson, Udall and O'Hara stated that the bill "guarantees the right of a member * * * to control membership and other fees charged by the union". House Rep. No. 741 on H.R. 4332, p. 78, 1 *Leg. Hist.* 836.

[41] 105 *Cong. Rec.* 15530, 2 *Leg. Hist.* 1566.

Senate's only by authorizing additional methods by which internationals could raise dues. Senator Goldwater, one of the conferees, in a comparison of the Senate and House bills, noted these changes and commented that the House version of § 101(a)(3) "appears technically preferable".[42] Senator Kuchel, the author of the Senate bill, stated that the Landrum-Griffin Bill "adopted substantially the same bill of rights language" which he had earlier authored.[43] The House Conference Report stated merely that any differences between the House and Senate provisions of Title I had been resolved in favor of the House version.[44]

2. Conclusions.

The objective of § 101(a)(3) readily appears from the foregoing recital. As stated by Judge Marshall:

> "It seems to be clear that Congress intended merely to assure that dues increases could not be imposed by irresponsible or arbitrary union leaders not answerable in any way to the membership at large. It did not set out to dictate to unions a particular method for voting by delegates at national conventions, and, especially, did not have any desire to foreclose national unions from giving more weight to their larger locals on this question" (R. 190).

This view was shared by the Court of Appeals for the Seventh Circuit in *Rance* v. *Office Employees*, 317 F. 2d 915, 918:

> "The protection of the rights of union members is the purpose of 101(a)(3). Unless the provisions

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[42] 105 *Cong. Rec.* 16487, 2 *Leg. Hist.* 1357.

[43] 105 *Cong. Rec.* 16760, 2 *Leg. Hist.* 1373.

[44] H.R. No. 1147 on S. 1555, 86th Cong., 1st Sess., p. 2, 1 *Leg. Hist.* 935.

> of subsection (B) are meaningless. Congress has said that that purpose is served when union members have representation at the council table where dues structures are changed."

The Court of Appeals in this case did not and could not point to any indication in the legislative history of a different or broader purpose. As already noted, it relied exclusively on what we have shown to be a misreading of the language of § 101(a)(3)(B)(i). But this Court has repeatedly observed the inadequacy of an uncritical reliance on statutory language in determining legislative intent. *Labor Board* v. *Fruit Packers*, 377 U.S. 58, 71-72, which likewise involved the Labor-Management Reporting and Disclosure Act of 1959, is particularly instructive. In rejecting a construction which would have outlawed consumer picketing *per se* the Court relied heavily on the circumstance that no sponsor of the bill considered consumer picketing to be one of the evils warranting legislation.[45] The same reasoning requires, *a fortiori*, rejection of the Court of Appeals' construction of § 101(a)(3). Not a word can be gleaned from the legislative history of this statute which even remotely suggests that any proponent or opponent of the bill, or any witness at the hearings, considered that weighted voting at conventions was an evil. On the contrary, the legislative history conclusively demonstrates that Senator McClellan, the individual most responsible for § 101(a)(3)(B) in its present form considered weighted voting at international conventions to be the most desirable method of representation.

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[45] "We think it is especially significant that neither Senator, nor the Secretary of Labor in testifying in support of the Administration's bill, referred to consumer picketing as making the amendments necessary." 377 U.S. at 65.

As we have seen, Senator McClellan was the prime mover of the events that led to the enactment of § 101 (a)(3). The critical phrase of § 101(a)(3)(B)(i) as enacted ("majority vote of the delegates voting") differs by only one word from that of § 101(a)(4)(ii) in Senator McClellan's prior proposal ("Majority vote of delegates present"). The change from "present" to "voting" (doubtless designed to prevent abstaining delegates from being counted as opposed to a dues increase) does not, of course, affect the immediate issue. For all relevant purposes, the language to be construed here is that of Senator McClellan. Senator McClellan in his original bill, S. 1137, would have *required* that the voting strength of convention delegates be proportionate to the size of their constituency. § 104(2) of S. 1137 provided:

> "Voting at Conventions.—All delegates elected or designated by the constituent units of an international labor organization pursuant to the provisions of Section 103(2) to represent such constituent unit at any meeting or convention held by such labor organization shall have a vote in all elections for officers and upon other matters brought before such meeting or convention for action or ratification by vote, *which vote shall be numerically equivalent, or proportionate, to the number of the members of such constituent unit* as disclosed by the roster of members required to be furnished under the provisions of section 103 (3)." (I *Leg. Hist.* 278, emphasis supplied)

Analyzing this provision of his bill, Senator McClellan stated that it was "designed to assure fair and equitable representation of constituent units". 105 *Cong. Rec.* 2668, 2 *Leg. Hist.* 1001. His proposal grew out of certain abuses uncovered by the McClellan Committee which can flourish under the rule of "one delegate, one vote", but are impossible where the delegate

votes his full constituency.[46] These include dividing a single local into many locals, thereby giving the original local a disproportionate voice in representative bodies,[47] and the creation of ghost locals which would cast ballots at international conventions and thereby tip the balance of power.[48] It is unthinkable that Senator McClellan, who proposed that *only* weighted voting be permitted at conventions would sponsor an amendment which would have prohibited such voting.[49]

[46] Senator McClellan had stated in testimony before the Senate Labor Committee that his bill "is the product of my judgment, based on what I have listened to for 2 years of the evils that I know exist, that I know need to be corrected * * *." Hearings on Labor-Management Reform Legislation Before the Subcommittee on Labor of the Senate Committee on Labor and Public Welfare, 86th Cong., 1st Sess. (1959) (hereafter cited as "Senate Hearings"), p. 705.

[47] The Interim Report described this practice as follows:

> "The locals in New York City were made up of members from various shops. One local, for instance, local 250, had members who were dogfood makers, optical workers, printers, notebook manufacturers, and crucifix platers. Under the arrangement as adopted by the executive board of the UAW-AFL each one of these units would have 1 vote, whereas the entire local may have had only 1 vote prior to this amendment. Weintraub said that a local union in his region had close to 5,000 members and had only 10 votes, while one of the New York locals with 500 members may have had 20 votes. Even Angelo Inciseo could not stomach this vote-stacking, according to Weintraub, so the plan was abandoned and Inciseo was persuaded to cast his vote for Doria on the strength of a promise that he would be made regional director of the UAW-AFL." *Interim Report of the Select Committee on Improper Activities in the Labor or Management Field*, S. Rep. No. 1417, Part II, 85th Cong., 2nd Sess., p. 191.

[48] *Id.*, pp. 198-99.

[49] Weighted voting is the only feasible method by which a vote "proportionate to the number of members of such constituent unit"

A most glaring mistake in the reasoning of the majority below was its failure to draw the obvious inference from Senator McClellan's proposal in S. 1137 and his sponsorship of what ultimately became § 101(a)(3)(B)(i). The majority said: "It is surprising that appellants should also rely upon the McClellan Bill and the Barden Bill, each of which specifically *allowed* weighted voting. * * * These bills were rejected." (R. 186, emphasis added). Under those bills weighted voting was not merely *allowed*, it was *required*. "These bills were rejected", not because Congress—or anyone else—opposed weighted voting, but because Congress was unwilling to unduly restrict unions in formulating their own voting procedures. The changes made from the Bill of Rights as introduced by Senator McClellan enlarged the permissible methods of raising dues. By these actions Congress demonstrated that it did not wish to disturb those union procedures which, in Representative Griffin's words, assured members, "that their dues and initiation fees will not be increased arbitrarily."[50]

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can be had by most international unions. For example, as Judge Marshall demonstrated, a fully proportional system of representation would require the AFM to have 14,000 delegates at its convention. (R. 191)

Congressman Barden, Chairman of the House Committee on Education and Labor and a supporter of the Landrum-Griffin Bill, also favored weighted voting in international conventions. Section 102 (b)(3) of the Barden Bill, H.R. 4473, would have required that the "voting strength of each delegate shall be determined in accordance with a formula which will insure and guarantee that each member of every constituent union of such international has an equal voice through his delegate in determining the results of all such elections [of officers]". 1 *Leg. Hist.* 190.

[50] 105 *Cong. Rec.* 15530, 2 *Leg. Hist.* 1566.

C. The Court's Construction of § 101 (a)(3) is Inconsistent with the Other Provisions of the Statute.

1. Title I.

The Court below, by reading § 101(a)(3) in splendid isolation, attributed to Congress a legislative purpose in clear conflict with the other provisions of the Act and, indeed, with the Title of which it was a part throughout the legislative process.

Thus, although the equal rights provision of Title I (§ 101(a)(1)) guarantees to members equal rights with respect to many internal political procedures,[51] the Court below read § 101(a)(3) as prohibiting equal representation in an international convention. It thereby assigns to Congress the bizarre intent to promote equal membership rights in one provision and to forbid such equality in another provision of the same title. Under that view, although equality of vote is required within the local, it is forbidden within the highest legislative council of the union.

The formula "one delegate, one vote" sacrifices equality of members on the altar of literalism to achieve equality of delegates. Yet every word of Title I, including its heading—"BILL OF RIGHTS OF MEMBERS OF LABOR ORGANIZATIONS"—proclaims that Congress was concerned solely with protecting the rights of members as members and not as delegates or as officers or employees.[52] The House managers of the bill took pains to emphasize that §101(a)

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[51] "Every member of a labor organization shall have equal rights and privileges within such organization to nominate candidates, to vote in elections or referendums of the labor organization, to attend membership meetings, and to participate in the deliberations and voting upon the business of such meetings, subject to reasonable rules and regulations in such organization's constitution and bylaws".

[52] There is already a fairly substantial body of opinion in the lower federal courts that Title I does not protect members in their

(5), relating to safeguards against improper disciplinary action applies only to suspension of membership and not to suspension of member's status as an officer.[53] There is nothing in the legislative history which remotely indicates congressional solicitude for the rights of delegates *qua* delegates, let alone an interest sufficient to subordinate the paramount interest of members in equality of representation.

That Congress concentrated on protecting the rights of *members* is further shown by the debate which led to the enactment of § 103. Section 101(a)(1) of the original McClellan bill of rights as approved on April 22

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capacity as officers or employees. See *Tomko* v. *Hilbert*, 288 F. 2d 625, 629 (CA 3), quoting with approval from *Strauss* v. *International Brotherhood of Teamsters*, 179 F. Supp. 297, 300 (E.D., Pa.):

> "• • • Without entering into a detailed discussion of each of its provisions, we observe that this part of the Act deals with (and is directed toward) the *membership in general* and their relationship, as members, with their union • • •". (Emphasis in *Strauss* opinion).

Accord: Csokerly v. *Loblow, Inc.*, 56 LRRM 2527 (W.D.Pa.); *Mamula* v. *Local 1211, United Steelworkers*, 202 F. Supp. 348 (W.D.Pa.); *Kelley* v. *Stricho*, 47 LRRM 2609 (E.D.Mich.); *Vars* v. *Boilermakers*, 204 F. Supp. 245 (D. Conn.); *Hamilton* v. *Guinan*, 199 F. Supp. 562 (S.D.N.Y.); *Barton* v. *Independent Packers Union*, 199 F. Supp. 138 (D. Kan.); *Bennett* v. *Hoisting and Portable Engineers, Local 701*, 207 F. Supp., 361 (D. Ore.); *Jackson* v. *Martin Co.*, 180 F. Supp. 475 (D. Md.). *Contra: Alvino* v. *Bakery Workers Union*, 56 LRRM 2812 (D. D.C.).

In *Grand Lodge* v. *King*, 56 LRRM 2639 (CA 9, June 9, 1964) the Court held that since officers are members they are entitled to all membership rights guaranteed in §§ 101 (a)(1) and (2) of the Act and may not be removed from office for exercising those rights. Whatever the merits of that decision, it is entirely consistent with the point we are making here, namely, that the statute is exclusively concerned with the protection of the rights of members and that no special rights are created in officers. Cf. § 501 (a) of the Act which imposes fiduciary obligations on union officers in behalf of union members.

[53] House Conference Report No. 1147, p. 9, 1 *Leg. Hist.* 935.

had provided generally that "every member * * * shall have equal rights and privileges within such organization including identical voting rights and equal protection under its rules and regulations."[54] Some Senators expressed concern that the Kuchel substitute, by particularizing the rights as to which equality was guaranteed, would exclude equality with respect to other rights. To avoid this implication, which Senator Kuchel expressly disclaimed, the Senate amended § 103 of the substitute, which preserved the rights which members had under state or federal law, to preserve also members' rights under "any union constitution or bylaws".[55] Yet the effect of the Court of Appeals' construction of § 101(a)(3) is to destroy the right which members of many unions enjoyed under their bylaws to be represented equally at their international conventions.

2. Title IV.

The proposition that Congress intended to prohibit weighted voting at conventions in connection with dues increases is likewise irreconcilable with Title IV of the Act: ["ELECTIONS".] Title IV enacts elaborate regulations for the election of union officers. There is nothing in that Title which prohibits election of officers at union conventions by a weighted voting system. Section 401(f) simply provides that "the convention shall be conducted in accordance with the constitution and bylaws of the labor organization insofar as they are not inconsistent with the provisions of this title."[56]

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[54] 105 *Cong. Rec.* 6475, 2 *Leg. Hist.* 1102.

[55] 105 *Cong. Rec.* 6719-6722, 2 *Leg. Hist.* 1232-1234.

[56] The only provision in Title IV regarding voting rights is § 401 (e) which requires that in any election required to be held by secret ballot "each member in good standing shall be entitled to one vote". This provision, like § 101 (a)(1), is plainly calculated to achieve equality among *members*.

The Secretary of Labor has officially interpreted Title IV as leaving unions free to determine their own systems of representation at conventions:[57]

> "There is no indication that Congress intended, in enacting Title IV of the Act, to require representation in delegate bodies of labor organizations to reflect the proportionate number of members in each subordinate labor organization represented in such bodies. Questions of such proportionate representation are determined in accordance with the labor organization's constitution and bylaws insofar as they are not inconsistent with the election provisions of the Act. *Congress did not attempt to specify the organizational structure or the system of representation which unions must adopt.*" (Emphasis supplied).[58]

Congress was well aware of the practice of many international unions to allow weighted voting proportionate to membership and other procedures other than "one delegate, one vote" at international conventions. Among the sources of information before

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[57] Since the Labor Department is vested with, and from the beginning has discharged, responsibility for enforcing the election provisions of Title IV, the Department's views are entitled to considerable weight. *Skidmore* v. *Swift & Co.*, 323 U.S. 124 139-40; *Norwegian Nitrogen Products* v. *United States*, 288 U.S. 294, 315.

[58] United States Dep't. of Labor, *Technical Assistance Aid No. 5, Electing Union Officers* (rev. Sept. 1962). The Secretary of Labor apparently expressed this opinion in answer to an inquiry whether the equal-rights provision of § 101 *requires* a system of weighted voting. The Secretary, while recognizing that the courts have enforcement authority over Title I, looked to Title IV as a guide to construction of § 101 (a)(1). The Court below, by contrast, treated Title IV as irrelevant in construing § 101 (a)(3). The Secretary's approach is clearly correct. See e.g., *Mastro Plastics Corp.* v. *Labor Board*, 350 U.S. 270, 285; *Labor Board* v. *Lion Oil Co.*, 352 U.S. 282, 288.

Congress when Title IV was drafted were the studies of the Bureau of Labor Statistics and the National Industrial Conference Board that surveyed the constitutional procedures regulating elections.[59]

The Bureau of Labor Statistics described voting at conventions as follows:

> "Under constitutions which provided for the election of officers by referendum, each eligible union member was to cast his own ballot. Where officers are elected at a convention, a delegate's voting strength is usually scaled to reflect the number of members he represents, although the specific formulas set forth in the constitutions differ considerably. For instance, the constitution of the International Brotherhood of Electrical Workers stipulated that 'each local union shall be entitled to a per capita tax vote on members; that is, one vote for each member in good standing . . .' Under this arrangement, the delegates of a local union with 5,000 members would be entitled to cast a total of 5,000 votes."[60]

Similarly, the National Industrial Conference Board's *Handbook* notes that as a rule international unions "weight the delegate's vote according to the number of members he represents." The *Handbook* continues:

> "The constitutions of a few small international unions give each local union's delegate one vote in nominating and electing the internal president. In these unions, the delegate's local has one vote

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[59] See Rezler, *Union Elections: The Background of Title IV of the LMRDA*, in *Slovenko, ed., Symposium on the Labor-Management Reporting and Disclosure Act of 1959* (Claitor's Bookstore Publishers, 1961), p. 475 at 482.

[60] United States Department of Labor, Bulletin No. 1239, *Union Constitution Provisions: Election and Tenure of National and International Union Officers* (G.P.O., 1958) p. 15.

> whether it has five or five hundred members. Most of the 137 constitutions, however, weight the delegate's vote according to the number of members he represents. Some constitutions achieve this weighting by requiring that voting be done by 'roll call per capita vote.' Other constitutions achieve the same end by specifying that the delegates are to represent units of one hundred members." [61]

In passing on another question in the interpretation of § 101(a)(3), the Seventh Circuit said in *Ranes* v. *Office Employees*, 315 F. 2d 915, 917-18:

> "We cannot assume that Congress was unaware of of the traditional structure and dues practices of labor unions when it enacted 101(a)(3), or that Congress being aware of the traditional structure and practices, intended by enacting that Section to strip international unions of their traditional power to control the minima and maxima of rates of dues without one word in the Committee Reports expressing that intention. On the contrary, we must assume that Congress was aware of the established structure and practices and interpret the statute in the light thereof. Cf., *Perrine* v. *Chesapeake & D. Canal Co.*, 9 How. 172; *Local 1976, Etc.* v. *N.L.R.B.*, 357 U.S. 93, 98-101."

In sharp contrast the Court below erroneously said:

> "Nor is it of significance that Title IV of the Act apparently permits the election of officers of unions by a weighted vote. The considerations the Congress may well have thought relevant to election of officers on the one hand, and raising dues at regular conventions, on the other, are not the same." (R. 185).

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[61] National Industrial Conference Board, *Handbook of Union Government, Structure and Procedures, Studies of Personnel Policy No. 150* (1956), p. 73.

Nothing warrants the Court's surmise. No such theoretical "considerations" are advanced, because, we submit, none are available. How to elect those who receive, invest and expend the monies of a union is hardly less critical to the welfare of members than how to obtain those monies. Indeed, the entire history of Title IV of the Act demonstrates that irregularities in the election of union officers were a predominant concern of Congress. In 1958 the Senate passed the Kennedy-Ives Bill whose regulation of union elections was the direct antecedent of Title IV. The Kennedy-Ives Bill had no provision prescribing the methods by which unions could raise dues. President Eisenhower in his 1959 message proposed legislation:

> "To require that unions observe minimum standards for the conduct of the elections of officers, including, in addition to periodic elections, the right of members to vote in secret without restraint or coercion and upon due notice, uniform opportunity for all members to be candidates, procedures to insure an accurate tabulation of votes, a ban upon the use of union or employer funds to promote candidacies for union office, and requiring constitutions and bylaws to contain detailed statements of election procedures and compliance with such procedures."[62]

This proposal was elaborated by Secretary of Labor Mitchell.[63] Neither the President nor the Secretary of Labor suggested that the methods for raising dues had been the subject of any abuse. Similarly, the Kennedy-Ervin Bill, S. 505, and the Bill reported out by the Committee contained election provisions almost

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[62] S. Doc. No. 10, 86th Cong., 1st Sess. (1959), p. 2, 1 *Leg. Hist.* 81.

[63] 105 *Cong. Rec.* 1727-1728, 2 *Leg. Hist.* 991.

identical to those of Title IV as enacted, but, as we seen, had no provision akin to § 101(a)(3). It cannot be assumed—as it must be to sustain the judgment below—that the same Congress which allowed weighted voting in union elections (which it closely regulated) prohibited such voting for raising dues in a provision designed only to insure membership participation.

D. The Construction of the Court Below Conflicts With The Policy of the Act as a Whole

As the Court below said: "Everyone seems to agree that the Labor-Management, Reporting and Disclosure Act was 'to insure union democracy,' and that the intended beneficiary of the provisions of the Act is the union member." (R. 186). Nevertheless, the Court adopted an interpretation which destroys a method which by its own view "is to all appearances the most 'democratic' method in the sense that each member is duly represented," and is "a method of voting widely recognized as fair and proper by a number of unions." (R. 184). Moreover, the Court conceded that "it may fairly be said that the passage of the Labor-Management, Reporting and Disclosure Act of 1959 was not brought about by any abuses found to have flourished under the aegis of the weighted voting system." (R. 185).

The Court's only attempt to justify its decision in terms of this conceded congressional policy was the following curious statement:

> "One need not be steeped in the historical data affecting the uses and abuses of labor organizations to realize that any complicated system of proposing and voting for increases in dues, initiation fees and assessments is subject to manipulation, to the disadvantage of the individual union member. We

> hold that the simple, unambiguous requirements set forth in Section 101(a)(3)(B) were intended to mean just what they appear on their face to mean, and that in this way the Congress intended to prevent future skulduggery of every possible character and description in the fertile field of increasing dues, initiation fees and assessments, even if no particular abuses in the matter of weighted voting for such increases have been proved." (R. 186).

This is wholly unwarranted speculation premised on nothing more than meaningless epithets. We pass over the majority's unrealistic assumption that Congress considers itself capable of preventing wrongdoing "of every possible character and description" in any field. And we readily acknowledge that any democratic right or practice may become the subject of "future skulduggery". But we respectfully insist that the Court reduced reasoning to absurdity when it assigned to legislators admittedly bent on expanding democracy an intention to forbid *equal* representation where the only abuses which "had been proved" grew out of *unequal* representation. Judge Marshall, dissenting, could

> "find no support for the majority's suggestion that dues increases are a particularly 'fertile field' for 'skulduggery,' to which an especially strict standard should be applied." (R. 188).

The Court below sought to justify its outlawry of a method which assured equality of representation by arguing that the statute allows a referendum vote of all members (R. 185). But a referendum, while also a democratic method used by many unions, has characteristics which other unions could lawfully consider to be undesirable. In its report on the Kennedy-Ives

Bill, the Senate Labor Committee outlined the possible objections to the formulation of union policy by referendum.[64] Their report thus totally refutes any possible contention that Congress thought the referendum so desirable that it forbade all other voting methods by which members would be treated equally.

Congress intended the widest possible preservation of established union procedures and practices. Of course, the Act altered or invalidated some union laws. But—consistent with entrenched democratic traditions[65]—it did so only to the extent that demonstrated past abuses established a compelling need. Numerous provisions of the Act expressly provide that the bylaws of the union shall be operative.[66] This was in direct response to impressive testimony urging maximum retention of democratic values of union autonomy.

In his testimony before the House Committee Secretary Mitchell said:

> "The administration does not believe that the Government should inject itself into the internal affairs of any organization more than is absolutely

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[64] Senate Report No. 1684, 85th Cong., 2nd Sess., p. 14. Referendums create special problems of administration for a union like the Federation, many of whose members are required to travel by their occupation.

[65] The classic statement is Chafee, *The Internal Affairs of Associations Not For Profit*, 43 Harv. L. Rev. 993, 1027-1029 (1930).

[66] For example, Congress, in allowing international executive boards to raise membership dues conditioned its approval on express authorization of such action in the union's own bylaws. See also §§ 3(h), 3(o), 101(a)(1), 101(a)(2), 101(a)(4), 103, 302, 303(a)(2), 304(c), 401(f), 401(h), 403. Other sections implicitly incorporate union bylaws, including § 101(a)(3)(B)(i) itself which, even under respondents' view, leaves the qualifications of delegates to be determined according to union law.

necessary to correct the evils which must be remedied."[67]

Professor (now Solicitor-General) Cox testified before the Senate:

> "I would urge that self-determination, self-government, is preferable to Government regulation. This means not only that interference in the internal affairs of unions ought to be kept to the necessary minimum, but also that wherever possible we should encourage unions to bring about their own reforms before we resort to Government sanctions."[68]

The Bill as enacted was a deliberate attempt to regulate demonstrated evils without unnecessary interference with historic union practices. As Senator Kennedy said when the Bill passed the Senate:

> "It is a bill designed to permit responsible unionism to operate without being undermined by either racketeering tactics or bureaucratic controls. It is designed to strike a balance between the dangers

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[67] House Hearings, p. 8. The Secretary also said:

> "I would hope that the committee would consider two things: (1) That it not enact legislation which attempts, as some proposals have, to regulate the internal affairs of a union in such a way as to stipulate what should be in the constitutions, what should be in the bylaws, and how the union should be run minutely and in detail.
>
> "I would hope that the committee would not do that, because I think, as I said in my statement, that this I do not think is the proper function of the Federal Government or any government." *Id.* p. 13.

[68] Senate Hearings, p. 112. See also the testimony of John Raber for the National Firemen's Union who praised the election provision of the Kennedy-Ervin Bill on the ground that it "imposes a minimum of Government regulation over the conduct of the internal affairs of unions." *Id.* at p. 220.

of too much and too little legislation in this field."[69]

In writing about the new law and its administration shortly after its enactment, Secretary of Labor Mitchell said:

> "It has been said that the Labor-Management Reporting and Disclosure Act of 1959 put the Department of Labor into the business of supervising internal union affairs for the first time. Without detracting from that statement, it should be recognized that the new law leaves in the hands of union members and officers the basic responsibility of running their unions honestly and democratically. The United States Government is *not* in the business of *managing* the internal operations of labor organizations, although its regulation of unions and their relations with employes has been substantially enlarged."[70]

Where Congress was careful to preserve, the courts should not rush in to destroy.

While in some situations there will be tension between the congressional objectives of promoting individual members' rights in union democracy and preserving traditional union practices, the two are by no means inconsistent.[71] Existing union constitutions

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[69] 105 *Cong. Rec.* 7021, 2 *Leg. Hist.* 1258.

[70] See Mitchell, *Safeguards for Union Democracy*, in *Slovenko, ed., Symposium on the Labor-Management Reporting and Disclosure Act of 1959* (Claitor's Bookstore Publishers, 1961), p. 135 (emphasis in original).

[71] Compare the statement of Senator Mundt:

> "• • • in the more than 30 amendments which have been added to the bill from the floor of the Senate we have moved in the direction of giving important new democratic tools to rank-and-file union members, with which I hope they may be able to do a good job of cleaning up the improper practices which we as legislators have not undertaken to do by way of legislative mandate." 105 *Cong. Rec.* 6743, 2 *Leg. Hist.* 1256.

and bylaws are themselves the product of that democratic self-government which the Act is designed to assure. This is particularly true of those provisions, such as Article 5 of the Federation Constitution, which represent the allocation of legislative power among the members themselves. As Professor Countryman has observed, Article 5 was designed as a compromise between the interest of large locals in proportionate representation and that of small locals not to be submerged by the large.[72]

Dr. Leiserson has described the three main types of voting methods recognizable in union constitutions as follows:

> "The first is the most common. This bases both the number of delegates and the number of votes on the same specified number of members, so that both increased roughly in proportion to membership increases. * * *

[72] "Legislative powers are exercised, and national officers are elected for one-year terms by the national convention, which is required to meet annually. In this convention, each Local has one vote for each 100 members subject, originally, to a maximum of ten votes for any one Local. Of course, this limitation pleased all but the Locals limited by it, the chief objector being the largest Local—New York's No. 310. In 1906 the New York objections culminated in a proposal to eliminate the ten-vote rule, but the convention, after listening to President Weber's reminder of the control exercised in the old National League by a few large Locals, adopted a compromise provision —still in effect—under which the ten-vote rule is retained for the election of officers but may be lifted on demand of ten delegates or five Locals in the enactment of laws, all laws so enacted to be subject to veto by a committee consisting of the Executive Board and the chairmen of all other national committees."

Countryman, *The Organized Musicians*, 16 U. Chi. L. Rev. 56, 59-60 (1948).

> "The second type holds down the number of delegates but grants additional votes in direct proportion to membership. * * *
>
> "The third type increases both the number of delegates and votes at a lessening rate as the membership increases. This has many formulas, but the principle is the same—the larger the local union the smaller its proportion of representatives and votes. * * *"[73]

He describes the purpose of these methods as follows:

> "All three types attempt to balance in some measure the representation of local government units and size of membership, i.e., of small and large locals."[74]

Yet the Court of Appeals, without pointing to a single demonstrated objective to be served by its construction, invalidated a voting procedure which followed a convention voting system utilized by many international unions for many years. The Court of Appeals' rigid determination that the only lawful system is one delegate, one vote, would not only invalidate provisions which allow delegates to vote the full *membership* strength of their constituency. It would likewise forbid the practice of a great many internationals to allow the delegates attending to cast the full *delegate* strength where less than the full number to which the local is entitled can come to the convention.[75] (R. 110-

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[73] Leiserson, *American Trade Union Democracy* (Columbia University Press, 1959), pp. 130-131.

[74] *Id.* at 13.

[75] See also *id.* p. 130: "Although proxy voting is generally prohibited (Longshoremen and Blacksmiths are exceptions), every convention delegate casts not only his own vote, but a share of the voting strength of the local union he represents as well. This voting strength varies with the size of the locals, and the total vote of a local union may be divided among its delegates or one of them may cast all its votes."

112). Thus, members of local unions would be deprived of representation to the extent that they could not afford the costs of sending delegates.[76] We have already noted that President Meany testified without contradiction that "section 101(a)(3) actually permits changes in dues * * * by every method which unions generally employ except action by a general executive board or similar body."[77] In view of the lengthy hearings and elaborate investigation into union practices which preceded the enactment of this law, it cannot be assumed that Congress was oblivious to the existence of these practices. As Judge Marshall said:

> "It is noteworthy that none of the Congressmen and Senators who discussed the bill ever adverted to this problem, or indicated in any way that a change in the practice was desirable. The same is true of the many commentators who have exhaustively analyzed the provisions of the Act, from every possible standpoint." (R. 191).

It is inconceivable that Congress would outlaw a widespread and concededly democratic practice without explicit language to that effect or any explanation of the reasons for such action. Accordingly, like Judge Marshall, this Court should reject a construction which would prevent "the use of a perfectly normal and accepted means of voting at union conventions, especially since there is no evidence that Congress felt this method was subject to any abuse whatsoever". (R. 191).

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[76] By the same token, the practice of many internationals to allow local unions to pool their resources to send a single delegate to the convention to represent and cast the voting strength of all of them would be invalidated. The members of many small locals would thereby be deprived of any representation. This, in a statute designed to promote union democracy!

[77] House Hearings, p. 1518.

In this case the Court is not required to resolve a conflict among congressional objectives. The Court of Appeals' construction advances neither the members' interest in union democracy nor the union's interest in preservation of its laws—the fruits of past democratic choice. Both interests are frustrated by the decision below. The right of members to equal representation at international conventions is destroyed.[78] So is the basic right of union members to govern themselves.

II. AS CONSTRUED BY THE COURT BELOW, § 101(a)(3)(B)(i) CONFLICTS WITH THE FIRST AMENDMENT.

Under the decision below, union members are forbidden to raise their own dues by a procedure which, in the Court of Appeals' own words, "is to all appearances the most democratic method, in the sense that each member is duly represented." As so construed, § 101(a)(3)(B)(i) constitutes an unprecedented interference with the self-government of union members in violation of the members' rights to free association as guaranteed by the First Amendment.

It is well that we state at the outset the reach of our argument: The constitutionally protected right to association necessarily encompasses the right to determine the rules governing its structure and procedures; that right in turn may not be infringed without some

[78] Equality of representation has long been considered to be an important element of democracy. Participation by the members of an organization, like that of citizens of a society, in the formulation of its decision is the essence of democracy. Where this participation consists of electing of representatives who are charged with decision making, equality of representation makes such participation more effective and meaningful. *Reynolds* v. *Sims*, 377 U.S. 533. Cf. *Wesberry* v. *Sanders*, 376 U.S. 1; *Gray* v. *Sanders*, 372 U.S. 368.

overriding public purpose. Since the application of § 101(a)(3)(B)(i) to invalidate weighted voting at international conventions serves no public purpose, its constitutionality cannot be sustained. Accordingly, we do not, for we need not, contend that Congress is forbidden absolutely to regulate the internal affairs of unions or even that Congress may not, as it has in § 101(a)(3), prohibit some methods of raising dues without any membership participation whatsoever.

It is now entirely beyond dispute that the freedom of assembly protected by the First Amendment encompasses the right of association. *Aptheker* v. *Secretary of State*, 378 U.S. 500; *NAACP* v. *Alabama*, 377 U.S. 288; *Railroad Trainmen* v. *Virginia Bar*, 377 U.S. 1; *Gibson* v. *Florida Legislative Committee*, 372 U.S. 539; *NAACP* v. *Button*, 371 U.S. 415; *Louisiana* v. *NAACP*, 366 U.S. 293; *Shelton* v. *Tucker*, 364 U.S. 479; *Bates* v. *Little Rock*, 361 U.S. 516; *NAACP* v. *Alabama*, 357 U.S. 449; *DeJonge* v. *Oregon*, 299 U.S. 353. Of course, "the Constitution protects the associational rights of the members of the union precisely as it does those of the NAACP." *Railroad Trainmen* v. *Virginia Bar*, 377 U.S. 1, 8. The right of workers to form labor unions was recognized by Mr. Chief Justice Hughes for a unanimous court in *Amalgamated Utility Workers* v. *Consolidated Edison Co.*, 309 U.S. 261, 265, as follows:

> "Neither this provision [Section 7 of the Wagner Act] nor any other provision of the Act can properly be said to have 'created' the right of self-organization or of collective bargaining through representatives of the employee's own choosing. In *National Labor Relations Bd.* v. *Jones & L. Steel Corp.*, 301 U.S. 1, 33, 34, we observed that *this right is a fundamental one;* that employees

> 'have as clear a right to organize and select their representatives for lawful purposes' as the employer has 'to organize its business and select its own officers and agents'; that discrimination and coercion 'to prevent the free exercise of the right of employees to self-organization and representation' was a proper subject for condemnation by compent legislative authority. We noted that 'long ago' we had stated the reason for labor organization—that through united action employees might have 'opportunity to deal on an equality with their employer,' referring to what we had said in *American Steel Foundries* v. *Tri-City Central Council*, 257 U.S. 184, 209." (emphasis supplied).

See also *Thomas* v. *Collins*, 323 U.S. 516.

It bélabors the obvious to observe that an organization without rules is a contradiction in terms. It is equally obvious that *self* organization means that those who join in a common cause *themselves* prescribe the rules by which their organization exists and functions. If government had unfettered power to fix the rules by which organizations may make decisions, it could control the results of their deliberations and indeed paralyze them.[79] Freedom of association, whose high function is to act as a counter-balance to the tyranny

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[79] The allocation of decision-making power can also affect the judgment whether to associate at all, since individuals and small groups are often reluctant to join an organization in which their proportionate strength is diluted by the voting structure. Yet, under plaintiffs' construction of § 101(a)(3)(B), Congress is said to have told the organized musicians (and millions of other organized workers) that they may not grant to members of large locals representation equal to that of similar locals. As Judge Marshall demonstrated it would be virtually impossible to achieve equality except by weighted voting. See n. 49, *supra*.

of the majority,[80] would thus be rendered illusory.[81] "Freedom of association is protected not only against frontal attack, but also from being stifled by more subtle governmental interference". *Bates* v. *Little Rock*, 361 U.S. 516, 523. Could Alabama constitutionally forbid the NAACP from acting except by referendum of its members? Could Congress constitutionally forbid all raising of union membership dues except by an 80% majority at a referendum?

This Court has held that freedom of religion implies the power of religious organizations "to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine." *Kedroff* v. *St. Nicholas Cathedral*, 344 U.S. 94, 116, reaffirming *Watson* v. *Jones*, 13 Wall. 679. Freedom to join in other private associations must likewise, to be meaningful, encompass the right of self-government. Indeed, this Court has equated the effect given by courts to the decisions of religious tribunals and that given "to the determinations of the judicatory bodies established by clubs and civil associations. *Gonzales* v. *Archbishop*, 280 U.S. 1, 16-17 (Brandeis, J.), quoted with approval in *Kedroff*, 344 U.S. at 116, n. 23.[82]

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[80] DeTocqueville, *Democracy in America*, Vol. I, Ch. 12.

[81] One need not go beyond the decisions of this Court for instances of majorities attempting to stifle the freedom of association of a minority to avoid that association's impact on public affairs. See e.g., *NAACP* v. *Alabama*, 357 U.S. 449; *NAACP* v. *Button*, 371 U.S. 415.

[82] Could it seriously be contended that a state would have the right to prescribe the means by which a religious organization can raise the dues of its members? Yet expulsion from a religious society may have economic and social—to say nothing of emotional or spiritual—consequences far more serious than expulsion from a labor union.

Since it has been held that the right of free association is not absolute,[83] future cases may require a delicate balance between the declared public interest in a particular regulation of internal union affairs and the members' constitutionally protected freedom from governmental interference. But the decision below raises the constitutional question in a much less difficult form: As construed by the majority, the statute outlaws long-recognized union procedures for self-government, admittedly without advancing membership participation —the provision's sole avowed purpose. On the one side of the constitutional balance thus to be struck is the right of members of an organization to allocate voting strength with regard to major policy decisions so as to give equal treatment to all members; on the other side is—nothing. Whereas the State may encroach upon personal liberties such as freedom of association "only upon showing a subordinating interest which is compelling",[84] no public interest whatsoever is promoted by requiring unions to discard weighted voting at international conventions. As was said in *NAACP* v. *Alabama*, 377 U.S. 288, 307-308:

> "This Court has repeatedly held that a governmental purpose to control or prevent activities constitutionally subject to state regulation may not be achieved by means which sweep unnecessarily broadly and thereby invade the area of protected freedoms. See *NAACP* v. *Alabama*, 357 U.S. 449 at 463-464. '. . . [T]he power to regulate must be so exercised as not, in attaining a permissible end, unduly to infringe the protected freedom.'

[83] E.g., *Communist Party* v. *Control Board*, 367 U.S. 1, 88-105.

[84] *Bates* v. *Little Rock*, 361 U.S. 516, 524. The governmental purpose unsuccessfully relied upon by the respondents there was the "fundamental" power to tax. *Id.*

Cantwell v. *Connecticut*, 310 U.S. 296, 304. ' . . . [E]ven though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved.' *Shelton* v. *Tucker*, 364 U.S. 479, 488 (footnote omitted). For other cases elaborating this principle, see *Lovell* v. *Griffin*, 303 U.S. 444, 451; *Schneider* v. *State*, 308 U.S. 147, 161, 165; *Martin* v. *Struthers*, 319 U.S. 141, 146-149; *Saia* v. *New York*, 334 U.S. 558; *American Communications Assn.* v. *Douds*, 339 U.S. 382; *Kunz* v. *New York*, 340 U.S. 290, 294-295; *Louisiana ex rel. Gremillion* v. *NAACP*, 366 U.S. 293."

A particular exercise of First Amendment liberties cannot be infringed without a proper legislative purpose merely because certain other activities may constitutionally be restricted. Thus, the concededly democratic weighted voting system followed at the AFM Convention cannot constitutionally be struck down on the ground that Congress could legitimately outlaw those methods for raising union dues which afford no representation to union members. Unless freedom of association no longer encompasses the right of employees to self-organization and union members, unlike other citizens, are to be regarded as mere wards, unable to govern themselves except under the benign tutelage of outside authority, the decision below cannot be reconciled with the First Amendment.

CONCLUSION

By reason of the foregoing, the judgment of the Court of Appeals should be reversed.

Respectfully submitted,

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APPENDIX A

Statutory and Constitutional Provisions Involved

United States Constitution:

Amendment I:

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

Labor-Management Reporting and Disclosure Act of 1959, 73 Stat. 519 *et seq.*, 29 U.S.C. § 401 *et seq.*:

TITLE I:

Sec. 101(a)(1), 29 U.S.C. § 411(a)(1):

> "*Equal Rights.*—Every member of a labor organization shall have equal rights and privileges within such organization to nominate candidates, to vote in elections or referendums of the labor organization, to attend membership meetings, and to participate in the deliberations and voting upon the business of such meetings, subject to reasonable rules and regulations in such organization's constitution and bylaws."

Sec. 101(a)(3), 29 U.S.C. § 411(a)(3):

> "*Dues, Initiation Fees, and Assessments.*—Except in the case of a federation of national or international labor organizations, the rates of dues and initiation fees payable by members of any labor organization in effect on the date of enactment of this Act shall not be increased, and no general or special assessment shall be levied upon such members, except—
>
> "(A) * * *

"(B) in the case of a labor organization, other than a local labor organization or a federation of national or international labor organizations, (i) by majority vote of the delegates voting at a regular convention, or at a special convention of such labor organization held upon not less than thirty days' written notice to the principal office of each local or constituent labor organization entitled to such notice, or (ii) by majority vote of the members in good standing of such labor organization voting in a membership referendum conducted by secret ballot, or (iii) by majority vote of the members of the executive board or similar governing body of such labor organization, pursuant to express authority contained in the constitution and bylaws of such labor organization: *Provided*, That such action on the part of the executive board or similar governing body shall be effective only until the next regular convention of such labor organization."

TITLE IV:

Sec. 401(e), 29 U.S.C. § 481(e): "In any election required by this section which is to be held by secret ballot • • • [e]ach member in good standing shall be entitled to one vote. • • • The election shall be conducted in accordance with the constitution and bylaws of such organization insofar as they are not inconsistent with the provisions of this title."

Sec. 401(f), 29 U.S.C. § 481(f): "When officers are chosen by a convention of delegates elected by secret ballot, the convention shall be conducted in accordance with the constitution and bylaws of the labor organization insofar as they are not inconsistent with the provisions of this title. The officials designated in the constitution and bylaws or the secretary, if no other is designated, shall preserve for one year the credentials of the delegates and all minutes and other records of the convention pertaining to the election of officers."

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1964.

No. 27

AMERICAN FEDERATION OF MUSICIANS OF THE UNITED STATES AND CANADA, *et al.*,

Petitioners.

v.

EDDIE WITTSTEIN, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF FOR RESPONDENTS.

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BRIEF FOR RESPONDENTS.

Opinion Below.

The Opinion (R. 122-139) of the District Court for the Southern District of New York is reported at 223 F. Supp. 27. The majority and minority opinions (R. 180-191) of the Court of the Appeals for the Second Circuit are reported at 326 F. 2d 26.

Jurisdiction.

Judgment of the Court of Appeals, having been entered on December 18, 1963, Petitioners invoke 28 U. S. C. Section 1254 (1) for jurisdiction. This Court granted *certiorari* March 9, 1964 (R. 194), 376 U. S. 942.

Questions Presented.

1. Was Petitioners' actual voting procedure, which purported to enact RECOMMENDATION No. 11 at the 66th Convention in June, 1963, violative of Title I, Section 101 (a)(1)(2) and (3) and Title V, Section 501 of the Labor-Management Reporting and Disclosure Act of 1959, 73 Stat. 519, *et. seq.*, 29 U. S. C. §§401 *et. seq.* (hereinafter called "LMRDA") to the extent that, with no notice to the AFM members and only six hours notice to the Convention delegates (on the third day of the Convention), it increased union dues and initiation fees, in part by means of split votes and duplicate votes?

2. Is Article 5 of the Constitution of the American Federation of Musicians of the United States and Canada (hereinafter called "AFM"), as applied at said 66th AFM Convention to "enact" RECOMMENDATION No. 11 by "roll-call vote", consistent with LMRDA (especially with Section 101 (a)(1), (2) and (3) thereof), since said Article 5 of AFM Constitution does not vest control over increases of AFM dues and initiation fees in AFM *members*, nor in their *delegates* in convention assembled?

3. Since the complaint herein admittedly seeks (a) a declaration that RECOMMENDATION No. 11 in its entirety is null and void and (b) an injunction restraining AFM from putting it into effect; and since the grounds on which plaintiffs seek such relief include facts showing material violation of AFM By-laws and of Section 501 of LMRDA by AFM officers who engineered "enactment" of RECOMMENDATION No. 11, and violation of Section 101 (a)(1), (2) and (3)(B) of the LMRDA; is the present appeal premature and should it be deferred until the trial of *all* issues raised

by said complaint (especially since Respondents never moved for nor sought summary judgment)?

4. Does the Record demonstrate that Section 501 (a) of the LMRDA was so violated as to nullify RECOMMENDATION No. 11 in its entirety on the grounds: (A) that the Court below had pendant jurisdiction over such violation; (B) Petitioners' officers in conducting the Convention breached their trust and fiduciary responsibility in relation to the AFM as an organization and to its members as a group, by

(a) "railroading" RECOMMENDATION No. 11 through said Convention;

(b) disobeying material and relevant provisions (respecting notice to delegates and to Locals of proposed changes of AFM By-laws) of Petitioners' Constitution and By-laws;

(c) suppressing, before and during the 66th Convention, vital information needed by delegates, members and Locals for intelligent and democratic consideration of RECOMMENDATION No. 11 and the problems it presupposed;

(d) misleading and misinforming AFM members, Locals and delegates respecting the problem with which RECOMMENDATION No. 11 purports to cope;

(e) limiting debate and free discussion on RECOMMENDATION No. 11 at said Convention to an evening session (the voting began after midnight) and to fifteen delegates, of whom nine were "hand picked" by AFM President Kenin (who chaired the Convention, and who favored the RECOMMENDATION) as members of the Committees which controlled the Convention and made it operate in "railroad" fashion;

(f) permitting vote-splitting and the casting of between 26,000 and 52,000 (depending upon which version given by AFM witnesses is correct) duplicate ballots during the vote on the RECOMMENDATION; and

(g) denying to AFM members and their delegates fair and equal representation of constituent units, democratic procedures and an opportunity to ensure that dues increases would not be imposed by irresponsible, arbitrary union leaders, not answerable at the time to the membership at large?

5. Did the "OFFICIAL PROCEEDINGS"* of the said 66th AFM Convention demonstrate that the Convention voting procedures which purported to enact RECOMMENDATION No. 11 deprived the delegates at such Convention as union members of equal rights granted to union members by Section 101 (a) (1) and (2) of LMRDA, thereby invalidating RECOMMENDATION No. 11 entirely?

Constitutional and Statutory Provisions Involved.

This case involved Title I, Sections 101 (a) (1) and (3), 29 U. S. C. §411 (a) (1), (2) and (3) as well as Title V, Section 501, of LMRDA. Sections 101 (a) (1) and (3) appear in Appendix A (pp. 58-59) of Petitioners Brief.

Counter Statement of the Case.

Factual Background.

The relevant *union* "law" is fully quoted (R. 126-130) in the Opinion of the United States District Court for the Southern District of New York, 223 F. Supp. 27, 33.

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* The "Official Proceedings" printed and distributed by AFM are herein referred to as "Proc." followed by the page number.

The complaint (R. 3-23) seeks a declaratory judgment (R. 22) nullifying as illegal the entire RECOMMENDATION No. 11 (Proc. 55-56). That RECOMMENDATION was a proposed resolution eventually "enacted" as AFM "law" by the 66th Annual AFM Convention held June 10-15, 1963, at Miami Beach, Florida. The "OFFICIAL PROCEEDINGS" of this Convention, as printed by AFM, are part of the record.

Proceedings in the Court Below.

On *Petitioners'* motion for summary judgment (R. 42-72, 108-121) the District Court granted *Respondents* (who had not moved for it [R. 73-104]) partial summary judgment, *i.e.*, to the extent of nullifying as illegal the increase of union dues and initiation fees mandated by paragraphs 2, 3, and 4 of RECOMMENDATION No. 11. The District Court held that these increases violated Section 101 (a) (3) (B) of LMRDA (R. 133; 138).

The original judgment (R. 143-144) was, on the consent of the parties, revised to read as follows:

> "Defendant having moved this Court for an order modifying and clarifying the Judgment dated October 30, 1963, heretofore entered in this action; this Court having heard the arguments of counsel and having been fully advised, it is
>
> "ORDERED that the first and second decretal paragraphs of the Judgment entered in this action on October 30, 1963 be modified so as to provide:
>
> "ORDERED, ADJUDGED, DECREED AND DECLARED that Items Nos. 3 and 4 of the Recommendation No. 11, passed at the 1963 Annual Convention of the American Federation of Musicians of the United States and Canada, insofar as they increase the dues and initiation fees of its members, were invalidly enacted

under Section 101 (a) (3) (B) (i) of the Labor-Management Reporting and Disclosure Act of 1959, 29 U. S. C. §411 (a) (3) (i); and it is further

"ORDERED, ADJUDGED, DECREED AND DECLARED that Item 2 (a) of Recommendation No. 11 shall not be construed to authorize an increase of union dues payable by members without compliance with Section 101 (a) (3) of the Labor-Management Reporting and Disclosure Act of 1959, 29 U. S. C. §411 (a) (3)."

Thus, the case, insofar as it concerns the remaining illegal features (R. 40-41) of RECOMMENDATION No. 11, challenged in the complaint, remains to be tried in the District Court, where it is still pending; and this appeal concerns only the *partial* summary judgment just quoted.

Relevant Facts and Events.

The complaint (R. 3-23) and the affidavit of Godfrey P. Schmidt (R. 73-104) set forth indisputable relevant facts and events, as derived from the "OFFICIAL PROCEEDINGS" of the AFM Convention and from other AFM sources.

RECOMMENDATION No. 11, which is quoted in full in the "OFFICIAL PROCEEDINGS" (Proc. 55-56), was voted at an "Evening Session" between 12:10 A. M. and 2:30 A. M., June 13, 1963 (R. 119). The Session had begun at about 8 P. M. on June 12 (Proc. 53-63; R. 118). The text of RECOMMENDATION No. 11 shows that it is an omnibus enactment, comprising 12 or 13 different and, in some instances, unrelated matters (Proc. 55-56). These included (a) increases of the "Annual Federation Per Capita Dues;" (b) increases of "Federation Initiation Fees;" and (c) increases of "Local regular periodic dues."

In violation of the requirements of democratic procedure, common sense and AFM By-laws, the text of

RECOMMENDATION No. 11 (which had been characterized by Mr. Kenin, AFM President, as the most important resolution ever enacted by an AFM Convention) had been distributed to the delegates less than six hours before they were asked to vote upon it (R. 93). No notice or information respecting RECOMMENDATION No. 11, nor respecting the somewhat similar RECOMMENDATION No. 2 (Proc. 83) had ever been distributed to the delegates, members or Locals prior to Convention.

Appellants' Brief (p. 7) contains a footnote reading in part:

> "At its June 1964 convention, the Federation passed by overwhelming voice vote, a resolution re-enacting the dues and initiation fees increases effective July 1, 1964. On the outcome of this case will determine the legality of the increase for the period of January 1 through June 30, 1964, as well as the legality of the voting procedure for future conventions."

What the footnote does *not* say is that 15 days' notice (prior to the "day set for the first session of the Convention," pursuant to Article 28, Section 4 of the AFM By-laws) was *not* given respecting RECOMMENDATION No. 11; but it *was* given respecting the "resolution re-enacting the dues and initiation fees." By contrast only six-hours notice was given with respect to RECOMMENDATION No. 11. Nor did the 66th Convention in passing RECOMMENDATION No. 11 comply with Article 28, Section 21, of the AFM By-laws.

Debate on RECOMMENDATION No. 11 (termed a "burning question" by President Kenin, chairman of the Convention (Proc. 31), was limited to speeches by fifteen (Proc. 58) out of 1219 delegates (Proc. 30), despite the promise

(R. 80) made by Mr. Kenin that "*full discussion*" of the problem making RECOMMENDATION No. 11 necessary would be allowed. (The "OFFICIAL PROCEEDINGS" do not exhibit the nature or extent of the discussion of RECOMMENDATION No. 11.) *Nine* of the *fifteen* delegates allowed to talk on the matter at the Convention were hand-picked by President Kenin (R. 89-93) and were, of course, in favor of the RECOMMENDATION.

Petitioners were put on notice that they had a problem requiring amendment of their By-laws by complaints in actions filed in the District Court in 1960 and 1962 (60 Civil 4025 and 62 Civil 2552); by the decision of the Court of Appeals for the Second Circuit dated October 17, 1961, (*Carroll* v. *AFM*, 295 F. 2d 484); by the District Court's decision of November 2, 1962 (*Cutler* v. *AFM*, 211 F. Supp. 433); and by the Court of Appeal's further decision of April 30, 1963 (*Cutler* v. *AFM*, 316 Fed. 2d 546, *certiorari* denied, December 9, 1961, 375 U. S. 941). Nevertheless, Petitioners came to the 1963 Convention without even a published draft of any proposed solution to the "burning problem" (Proc. 31) or of any proposed By-law amendment which was required, as they very well knew (R. 83-90; 94-95), to bring AFM practice and By-laws into conformity with Federal statute as authoritatively construed by Court decisions.

AFM "laws" provided *five* methods of Convention voting:

1. Article 28, (entitled "CONVENTION PROCEEDINGS")
2. AFM By-laws:

> "For Rules of Order, Robert's Revised Manual shall be the guide unless otherwise provided *and the manner of voting shall be viva voce, unless otherwise ordered*". (emphasis added).

2. Unweighted votes by Convention delegates, under ¶21, Article 28 of AFM By-laws:

> "No alterations or amendment to the Constitution or By-laws (except it is otherwise provided in the By-laws or ordered by a convention) shall be made unless proposed in writing, and said alterations or amendments must receive *a majority vote of the delegates present* to become a law, unless otherwise provided" (emphasis added).

3. The *first part* of Article 5, AFM Constitution, calls for weighted voting by delegates: each Local has from one to ten votes, depending upon the size of the Local's membership (R. 126).

4. Voting by *written ballots* is authorized by Article 28, ¶2, AFM By-laws, as supplemented by Robert's Rules of Order, ¶46, pp. 193-196.

5. Vote "on roll-call" is provided in the *second part* of Article 5, AFM Constitution (R. 126). An AFM official admitted that he had never in nineteen years of attendance at AFM Conventions seen this method used (R. 155).

Belatedly, AFM admitted (its "Official Proceedings" do *not* show this) that there were *two voice votes* (R. 176) at the Convention. RECOMMENDATION No. 11 failed to pass either of them (R. 172-173). No standing or rising vote (as required in the circumstances by Robert's Rules of Order) was called for by the Chair after it had twice (falsely) announced that the "Ayes" and the "Nayes" were "of equal response" (R. 98). After the alleged double failure of the "voice vote", an unnamed delegate proposed a vote by *written ballot*: "I think we should set the machinery in motion tonight or tomorrow morning for a ballot vote. This will give us the only real decision" (R. 114-115).

The Chairman (an attorney and AFM President: Herman Kenin) immediately misstated this request and answered: "Well, a roll-call vote is what you are referring to. Any ten delegates or five locals may ask for a roll-call vote if you are dissatisfied with the voice vote" (R. 115).

As if by prearrangment, the Chair *immediately* recognized Delegate Merle Snider, who instantly called for a "roll-call vote" (R. 115). *Forthwith* Snider said he *had* five Locals. This was accepted by the Chair with alacrity as *mandating* the rare and peculiar vote on "roll-call" (R. 115-116) under Article 5, AFM Constitution—a method not used in more than 20 years of Annual Conventions.

In those portions of the *verbatim* minutes (R. 114-121) of the Convention eventually revealed by Petitioners, the latter carefully avoided disclosure of the actual proceedings (a) *during the two voice votes* and (b) *during the transition from the voice votes to the proceedings just described* (R. 175-179). Petitioners strenuously opposed Respondents' efforts to obtain the tapes or *verbatim* transcripts of omitted portions of the proceedings (R. 175-179; 169-171). Respondents contend that the Chair deliberately misrepresented the two voice votes; and that, in fact, the voice votes clearly and loudly rejected RECOMMENDATION No. 11 (R. 98). Play-back of the tapes would have shown this (R. 169-170).

The Record shows indisputably that: after the voice votes no motion to reconsider was offered (R. 175-178); the "roll-call" voting began after 12:10 A. M. on June 13, 1963 (R. 119); a delegate asked for a written *ballot vote* (R. 115) which the Chair immediately evaded by misrepresenting it as a call for the unprecedented "roll-call" vote (R. 115), as to which the Chair inaccurately ruled that, if the delegates "are dissatisfied with the voice vote," they could use the "roll-call" vote method (R. 115); delegate Merle

Snider, in calling for the unusual "roll-call" vote *instantly thereafter,* presumed to speak for *six* Locals, although he was the delegate from only one of the six (R. 115); Snider could not possibly have had time (except by pre-arrangement with the Chair) to consult with delegates of *five Locals other than his own* in the instant between President Kenin's ruling on the unidentified delegate's request for a written ballot vote (115a) and Snider's call for the unparalleled "roll-call" vote (R. 115); the Chair did not ask the delegates from the other five Locals whether, in fact, they had demanded the extraordinary "roll-call" vote (R. 115-116); the "roll-call" voting procedure was without precedent (R. 116) or so rare, as the Chair itself admitted (R. 116), that the latter had to explain it to the delegates (116a); the "roll-call" voting procedure used by Appellants under Article 5 of the AFM Constitution (Appellants' Brief, p. 5) is quite different from the usual "Vote by Roll Call" ("Yeas and Nays") described by Robert's Rules of Order, §46, pp. 197-198 (Revised Manual) or used by Congress; the Chair in a bumbling explanation of the "roll-call", authorized without authority in AFM "laws" the *splitting of the membership votes* by delegates and according to their sole discretion (R. 116; 120); the Chair resisted all efforts to postpone the past-midnight vote until the next morning (R. 115; 117-118; 119); RECOMMENDATION No. 11 was rushed through in great haste (R. 117-119; 89-93); delegates found the conglomerate nature of RECOMMENDATION No. 11 a handicap for the purposes of consideration and voting (R. 115; 117-118); a minority of the individual delegates voted for RECOMMENDATION No. 11 (Proc. 7-30; 58-63); and the AFM *members* (as distinguished from their *delegates* at the Convention) had not the faintest knowledge of RECOMMENDATION No. 11 and

the midnight debate concerning it at the Convention (R. 93-98).

In conducting the curious "roll-call" vote, Petitioners included between at least 26,000 and 52,000 duplicate votes (R. 33-34; 73-74; 146-151; 155-165; 109); and they allowed vote-splitting by the delegates (23b; 116a; 120a) according to the untrammelled discretion of the delegates from each represented Local.

The number of delegates attending the Convention was fixed at 1,219 by the Convention's Credentials Committee (R. 151-153).

The vote which enacted RECOMMENDATION No. 11 was 158,068⅔ favoring "Yes" and 113,742⅓ favoring "No" (Proc. 63). Thus, the margin was 44,326⅓. The total number of votes cast by the 22 Locals which had split membership ballots was 15,066 (Proc. 58-63). Exactly how many duplicate votes were cast was not consistently admitted by Petitioners. Scola's first affidavit states that "approximately 26,000 are members of two or more locals" (R. 46). He confirmed this on the stand:

> "Q. Did you give him [Petitioners' attorney] any information to the effect that there were 26,000 members of the AF of M who belonged to two or more locals? A. Yes.
>
> Q. And this is what you meant when you wrote paragraph numbered three of that affidavit? A. That's right.
>
> • • • • • •
>
> Q. You said that approximately 26,000 members • • • are members of two or more locals; isn't that correct? A. That's correct, sir.
>
> Q. Is that a correct statement? A. That is what I said" (146-147).

This would mean, necessarily, that *at least* 26,000 votes were duplicates. But Scola's second affidavit (108-109) contradicts this. There (R. 109) he states that "12,381 members of the Federation are members of more than one Local;" and that they involved at least "26,174 duplicate ballots". AFM witness Neri testified that he could not be sure of the 26,174 figure: "It might come up with more" (R. 160).

The total of the split votes, 15,066, and the sometimes admitted duplicate total of 26,174 amounts to 41,240, which almost wipes out the margin of 44,326⅓ votes by which RECOMMENDATION No. 11 was "passed". If Scola's earlier testimony and affidavit are correct, the duplicate votes exceeded that difference. Neri's testimony confirms that the AFM figure of 26,174 is unreliable (R. 146-155).

Incidentally the theory on which some delegates' votes were split is incomprehensible. For example, Local 204 had *three* delegates; and, under the weighted voting system of the "roll-call" vote, it had 541 votes. Its three delegates cast *one* ballot for "Yes" and 540 for "No"! (Proc. 60).

Summary of Argument.

The 66th Annual AFM Convention increased union dues and initiation fees in violation of Section 101 (a) (3) Title I, of the LMRDA. It violated Congressional intent in applying the "roll-call" vote under AFM Constitution, Article 5. It perpetrated one of the very abuses Congress wanted to eliminate, as the relevant legislative history shows. The majority opinion below correctly construed the applicable statute. There was no genuine vote of the delegates. The Convention violated both the rational

concept of *majority rule* and James Wilson's sound theory of *equal elections*. The 66th Convention was neither *democratic* nor *representative*. Title IV of LMRDA and S. 1137 are irrelevant. Section 101(a)(3) of LMRDA as applied to defendants in this case does not conflict with the First Amendment. It does conflict with AFM Constitution, Article 5, insofar as control is unlawfully vested in an overall Convention Committee.

POINT I.

The 66th annual AFM convention increased union dues and initiation fees in violation of Section 101 (a) (3) Title I, of the LMRDA.

1. **An advisory opinion should not be rendered.** Question No. 1 of the "QUESTIONS PRESENTED" in Petitioner's Brief (p. 2) is academic and unrelated to the realities and events of this case. It asks a general question, sterilized from contamination with the procedures actually used by the 66th AFM Convention in June, 1963. In effect, it asks an advisory opinion. It is "based upon the number of members they [the delegates] represent" and upon "weighted voting," as if the issue here involved merely concerns a mathematical relationship involving many unions.

Respondent's "Counter-statement" demonstrates the unreality of such an issue, and its lack of *real* (as distinguished from verbal) relationship with this case.

There can be no dispute that RECOMMENDATION No. 11 (Proc. 54-55) did purport to increase (a) the "Federation Initiation Fees"; (b) the "Local regular periodic dues"; and (c) the "Federation Per Capita Dues." (141a)

2. **Legislative Intent on Petitioners' theory.** True, "every word of Title I * * * proclaims that Congress was

concerned solely with protecting the rights of members as members and not as delegates or as officers or employees." (Petitioners' Brief, p. 36) What the 66th AFM Convention did was to protect the powerful *delegates* upon the basis of *unequal* votes, without the slightest consideration of the "*members* as members". The discriminatory and unequal protection of the *delegates'* right to participate in a Union meeting (Convention) was based upon voting strength unequally accorded to various delegates. This gave the *countenance* but killed the *soul* of democratic and representative procedure. The "*members* as members" of populous AFM Locals had no more participation in the Convention than the "*members* as members" of the small Locals. Each *Local membership* was entirely bereft of *democratic participation* and *representation*. The *delegates* acted *for themselves* and *on their own discretion*. Yet it was not really just the *delegates' vote* which was listed on the tally sheets. Delegates from Locals with large memberships, were given voting rights superior to those of *delegates* from lesser Locals. The rights of "*members*, as members", were not safeguarded nor protected in any way by the "roll-call" vote. The only rights that were protected were those of the alliance which ran the Convention, an alliance of influential delegates and AFM officers. On Petitioners' theory (p. 37), Congress had more solicitude for the rights of *delegates* (not members) from large Locals, and less solicitude for the rights of *delegates* (not members) from non-populous Locals. The 66th AFM Convention subordinated the paramount interest of the "*members* as members" in *equality of representation* to the "roll-call" vote method under which the mere AFM *member* was a non-entity.

3. **A non-Congressional view of legislative intent.** In his article entitled "*The Labor-Management Reporting and*

Disclosure Act of 1959", Benjamin Aaron, in the Harvard Law Review (Vol. 71, March 1960, No. 5, pp. 851-907, 866) discusses his theory of Congress' legislative intent:

> "Section 101(a)(3) of the new law provides that, except in the case of a federation of national or international unions, no labor organization may increase the rates of dues and initiation fees in effect on the date of the law's enactment, nor may it levy a general or special assessment upon its members, unless it follows prescribed procedures • • •
>
> "The language of the McClellan amendment to S.1555 differed significantly from §101(a)(3) as it now stands in these respects: First, it did not so carefully differentiate between the appropriate procedures by which dues or initiation fees could be increased, or assessments levied, by local unions on the one hand, and by national organizations on the other; second, it contained an absolute prohibition against charging any individual seeking to become a union member an initiation fee 'in excess of seventy-five percentum of the amount of the prevailing weekly wage • • •'.
>
> "*The basis for including §101(a)(3) in Title I of the new law has never been clearly established.* Section 8(b)(5) of the National Labor Relations Act [61 Stat. 141 (1947), as amended, 21 USC §151(b)(5) (1958)] makes it an unfair labor practice for a union to require of employees covered by a valid union security agreement an initiation fee which the NLRB finds 'excessive or discriminatory under all the circumstances'. Only a few cases charging a violation of that section have been filed since its enactment in 1947, and these have tended to involve claims that initiation fees were discriminatory rather than excessive. The fact is that the overwhelming majority of unions require only reasonable initiation fees and dues, and ***few issues are more likely to arouse active opposition and general membership participation***

> *than a proposal to increase dues. One suspects that the real target here is union assessments.* Those who oppose the political activities of organized labor are especially sensitive to assessments for such purposes • • •.
>
> "Section 101(a)(3) does not get at these issues; the most it can do is *insure that union fees will not be raised or assessments levied without the consent of the majority.* As Professor Cox has pointed out, however, the principle of majority rule should not be the sole criterion, 'because the very question at issue is whether the individual or minority should be guaranteed this degree of political liberty regardless of the will of the majority, just as the Constitution guarantees religious liberty and freedom of speech to political minorities.' " (emphasis added).

Congress did *not* adopt Professor Cox's view; nor does Professor Cox, as Solicitor General (in the Brief of the Justice Department) adhere to the view he expressed while a University Professor.

4. **The Abuses Congress sought to discourage.** Abuses in the conduct of union conventions and in the voting procedures thereof had come to the attention of Congress. Hearings before the Select [McClellan] Committee on Improper Activities in the Labor or Management Field (85th and 86th Congress) Parts 1, 2, 5, 8, 10, 11, 12, 13, 27, 28, 30, 36-40, and 57.

This was particularly true of the rigged Teamster Convention which resulted in the election of Mr. Hoffa at the International Brotherhood of Teamsters' Convention at Miami Beach in 1957. It was also true of the rigged election of Joint Council No. 16 of the International Brotherhood of Teamsters in 1956 (*Lacey* v. *O'Rourke*, 147 F. Supp. 922), which became the subject matter of four volumes of

investigation by the McClellan Committee. *Ibid.*, Parts 10, 11, 12 and 13.

It was true, too, of the rigged 1956 Convention of the Bakery and Confectionery Workers Union. *Ibid.*, Part 8.

5. **Interpretation of the relevant statute.** The crucial language of the statute appears in Section 101(a)(3)(B)(i) of LMRDA: "majority vote of the delegates voting at a regular convention." Syntactically and grammatically, the noun, "vote," is modified (a) by another noun, "majority," used as an adjective; and (b) by the adjectival phrase: "of the delegates voting at a regular convention." The majority-*vote* (in the *singular*), as the statute makes clear, is the collective act of the "delegates voting". That is why the word was "vote," not "votes."

Petitioners assume that the word, "majority," in the context here in question, does not mean a "majority" *of delegates* but rather a "majority" *of votes*. But "majority vote" here means *both* a majority of votes and a majority of delegates.

"Congress left each union free • • • to determine the number of votes those delegates could cast." (Petitioners' Brief p. 11). If this were really and literally true, it could justify, in the concrete, a voting arrangement under which Local 802, with 28,438 members, could be given three votes and Local No. 1 with 128 members could be given 30 votes!.

According to Petitioners' theory, the very statute by which Congress sought to protect rank-and-file members against union leaders seeking to increase dues and initiation fees could be used against those members. Armed with an assortment of five voting procedures, the AFM combination which controlled the Convention could experiment and machinate until an apt choice produced desired results.

Where a majority of *delegates* could not be obtained, a *membership* majority, distributed without the knowledge of the members, according to the unfettered discretion of the *delegates, might* (and in this case *did*) do the job.

Delegates whose voting strength is multiplied by factors equal to the numbers of members in the *large* locals would, under the interpretation urged by Petitioners, enjoy an influence completely out-classing that of numerous delegates from small Locals. A relative handful of delegates with heavily weighted voting power could take over a convention.*

The LMRDA gives to the majority "*vote*" of the *delegates collectively* "voting at a regular convention" or to the *members themselves* the ultimate control over dues increases. The LMRDA did not give that control to a relatively small number of delegates armed with large balloting leverage. This does not mean that Congress, in the LMRDA, intended to discount the membership strengths of local unions. Doubtlessly, Congress took the usual union procedure for granted: that the *number of delegates* would be increased in proportion to the number of *members of the local* by some reasonable ratio; just as the States are, or constitutionally should be, represented according to certain proportions in the House of Representatives where each member has only one vote.

The vote at the 66th AFM Convention was not a "vote *of the delegates.*" It was not a mere *delegate*-vote. Nor was it a "majority vote *of the delegates voting* at a regular convention" (as the statute requires); nor was it a "major-

* "The plural ... of votes must on no account be carried so far that those who are privileged by it, or the class (if any) to which they mainly belong, shall outweigh by means of it all the rest of the community." *Representative Government*, John Stuart Mill, Chap. 8, P. 386 Encyclopaedia Britannica, Inc., 1952. Britannica Great Books, Vol. 43.

ity vote *of the delegates present*" (as the AFM Constitution, Article 28, Section requires). In reality and in effect, a *balloting by Locals* rather than *by delegates* is what Article 5 of the AFM Constitution mandates on "roll-call." Title I calls for a "majority vote of the delegates voting" [§101 (a) (3) (B)] and for equal votes, since the delegates are members [§101 (a) (1)]. By contrast, the AFM Constitution (Article 5) gives delegates *unequal* voting power, once the delegates from five locals call for the rarely used "roll-call vote." Indeed, Article 5 of the AFM Constitution gives control over decisions of the delegates to an over-all convention Committee largely picked by the AFM President. AFM conventions generally operate by equal voting power, *i.e.*, by "voice votes". The AFM Constitution also allows delegates from five Locals, acting in conjunction with the Chairman of the Convention, to invoke a voting system which, in contrast with the usual voting system employed at union conventions, creates a class of powerful delegates with heavy balloting weight. Intra-convention *class discriminations* lend themselves readily to the juggling of the "smoke-filled room" and to concentration of union power in a few hands by virtue of planned, intra-union political schemes.

Mathematically, a majority of the delegates at the 66th Convention voted against RECOMMENDATION No. 11. (Proc. 58-63) Only when the vote of those delegates was gerrymandered and transmitted (for the first time in more than twenty years) by the peculiar system of weighted voting called by the second part of Article 5, AFM Constitution, was it possible to "enact" RECOMMENDATION No. 11. According to the AFL-CIO Brief, only 19 out of 131 unions have constitutions which permit to use this "weighted voting" system; but nothing in the Record shows that they use this system any more frequently than did

the AFM; or that they ever increase dues by such a weighted-voting system since 1959.

It is not possible without judicial legislation to construe "a majority vote of the delegates voting" to mean a "majority vote of the delegates whose *votes* (not vote) are mathematically equivalent to the number of members they respectively represent."

The meaning of the word, "delegate," is critical. Webster's "*New International Dictionary*," Second Edition, defines "delegate" as follows:

> "One sent and empowered to act for another; a deputy; a representative; a commissioner. Specif.: *a Eng.* Formerly, one of the commissioners constituting the Court of Delegates. *b* A representative of an association or constituency in a convention • • • ".

Nothing that occurred at the 66th Convention illustrates genuine *representation* in the sense of the foregoing definition or in any rational sense. The procedure of those who expedited RECOMMENDATION No. 11 was the antithesis of *democratic* or *representative* procedure.

The very title of Article 5 of the AFM Constitution, "REPRESENTATION AND DELEGATES," suggests that delegates are to be genuine *representatives* of the members. Common practice in the trade union movement in the United States confirms this. The convention is the highest legislative body of any union. Be that as it may, the decision below only forbids use of "roll-call" votes where, in the circumstances of this case, dues increases are involved.

The Congressional debates on the Landrum-Griffin Act as well as the relevant Congressional Reports demonstrate that the chief legislative purpose was to take from union officers (who had frequently abused the power in the past)

the right to increase union dues and initiation fees unilaterally or against the wishes of the majority of members. (House Rep. No. 741, on H. R. House Role 834, Pp. 7-9, 81-82, 29-30; Conference Rep. [H. Rep. No. 1147] on S. Senate 1555, P. 31; Senate Rep. 187 on S. 1555 Pp. 2-10; 70-72.)

Congress intended that the members be protected against the very type of jobbery or intrigue which characterized the 66th Convention. The members never learned of RECOMMENDATION No. 11 before it was "enacted." Their own *delegates* never knew anything about it until six hours before the midnight session at which they three times voted upon it. Debate was artfully and artificially limited to fifteen delegates, of whom nine had been hand-picked by the Chairman who favored the RECOMMENDATION. Deliberation and full discussion of the measure were prevented by the very lateness of the hour.

6. **Contextual construction of statute.** The statutory words, "majority vote", are used *five different times in subparagraphs (A) and (B) of Section 101 (a) (3) of the LMRDA:*

I. *(A) (i)* "* * * *by majority vote*, by secret ballot, of the members in good standing * * *"

II. *(A) (ii)* "* * * *by majority vote* of the members in good standing * * *"

III. *(B) (i)* "* * * *by majority vote* of the delegates voting at a regular convention * * *"

IV. *(B) (ii)* "* * * *by majority vote* of the members in good standing * * *"

V. *(B)(iii)* "* * * *by majority vote* of the members of the executive board * * *" (emphasis added in each instance).

It is significant and indisputable that in phrases numbered I, II, IV, and V, *supra*, there can be no question whatever about the kind of "majority" intended by Congress.

In phrase numbered "I" *(supra)* each *member in good standing* has but *one, unweighted vote;* and the majority of the votes cast, or a majority of the members, controls the outcome of the vote.

In phrase numbered "II" (*supra*) the result is dictated by a majority of the votes or a majority of the members, each of whom casts but *one, unweighted vote.*

In phrase numbered "IV" *(supra)*, which is identical with phrase numbered "II", Congress once more indicated that each member was to have but *one, unweighted vote;* and the majority of the votes or a majority of the members controlled the outcome of the vote.

In phrase numbered "V" *(supra)*, Congress indicated that in voting by members of the Executive Board, each member was to have but *one, unweighted vote.* Therefore, a majority of votes or a majority of members of the Executive Board determined result.

There is no reason to deviate from the rule of "one voter, one vote" (exemplified by phrases I, II, IV and V, *supra*) with respect to phrase III. The latter's meaning is known from the company it keeps. *Noscitur a sociis.*

Since Congress used the phrase, "by majority vote", *five times* in Section 101 (a) (3) (A) and (B), it becomes relevant to inquire into the dictionary meaning of the words, "vote" and "majority". Webster's "*New International Dictionary*" (Second Edition), defines the noun, "vote", in so far as conceivably relevant here:

> 2. A wish, choice, or opinion of a person or a body of persons, expressed in some received and authorized way, as by a ballot or viva voce; the formal

> expression of a wish, will, or choice, in regard to any measure proposed, esp. where the person voting has an interest in common with others in electing a person to office, or in passing laws, rules, regulations, etc.: a suffrage.
>
> 3. Expression of judgment or will by a majority; legal decision by some expression of the minds of a number; as the *vote* was unanimous; a *vote* of confidence • • •
>
> 4. Votes collectively; the collective opinion of a group, party, or assembly, as; the prohibition *vote*. • • •
>
> 7. That by means of which will or preference is expressed in elections, or in deciding propositions, as the voice, a ball, a ballot, a ticket, a voting paper; as, a written note.

It would seem that meanings 4. and 7. (*supra*) are not as applicable to Section 101(a)(3) of the LMRDA as meanings 2. and 3. The wish, choice or opinion referred to by the statute is that of a "body of persons"; namely, "members in good standing", "delegates" and "members of the executive board". The dictionary definition recognizes the two most common methods which are "received and authorized" for the expression of such "wish, choice, or opinion": "ballot" or "viva voce".

The same Webster's "*New International Dictionary*" defines "majority", insofar as here conceivably applicable:

> 2. *a* The greater of two numbers that are regarded as part of a whole or total; the number greater than half; more than half of any total; also, the excess of this greater number, as a vote, over the remainder of the total. *b* Loosely, a plurality.
>
> 3. The group of party whose votes preponderate.

Obviously, in the phrase, "by majority vote", the "group or party" whose votes preponderate are the same as the "body of persons" (in the definition of "vote") who express "in some received and authorized way, their wish, choice of opinion"; namely, the *members in good standing*, the *delegates* taken collectively, and the *members of the executive board*.

As pointed out by Leo Bromwich in his monograph entitled "Union Constitutions" published as a Report for the Fund for the Republic in July, 1959:

> "* * * most of the unions guard against the concentration of too much power in the hands of a single delegate by specifying the maximum number of votes a delegate may have. * * *"

A weighted voting system such as Petitioners advocate is an apt tool, at the disposal of a small number of ambitious delegates representing Locals with large memberships who choose to conspire with, or are cultivated by, AFM Officers scheming the Convention. Such an alliance could easily control a Convention. Concentration of power in the hands of a few received much wise criticism from various issues of "*The Federalist*":

> * * * Justice is the end of government. It is the end of civil society. It ever has been and ever will will be pursued until it be obtained, or until liberty be lost in the pursuit. In a society under the forms of which the stronger faction can readily unite and oppress the weaker, anarchy may as truly be said to reign as in a state of nature, where the weaker individual is not secured against the violence of the stronger * * *." (No. 51; p. 164)*

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* All references to "The Federalist" are to Volume 43, Great Books of the Western World, Encyclopaedia Britannica, Inc., Chicago (1952). References to John Locke, John Stuart Mill and Aristotle are to the same collection of classics.

The general rule, "one person, one vote" (here, "one delegate, one vote") is so well and long established* that exceptions to it should be made only for the most persuasive reasons. In the instant case, syntax, semantics, the history of previous intra-union abuses, the potential for future abuse and the theory or philosophy of majority rule all conspire to support the interpretation made by the Court below. It is true that under the "roll-call vote", more than one-half of the total (271,811) *membership-weighted* votes were cast in favor of RECOMMENDATION No. 11. But the "roll-call vote" procedure could not properly be called a "majority vote" in the statutory sense nor "majority rule" in any sense; because it was not really a majority vote *of the delegates*. It was a "majority vote" whereby the delegates were mere conduits for spilling into the tally floods of ballots equal to the number of incognizant union members. The "roll-call vote" is a vote *of Locals*, more than a vote of *delegates*. It was, under the AFM Constitution, Article 5, *subject to veto or approval by an overall committee*.

7. **The false analogy with stockholders votes.** Petitioners attempt to reason analogously by citing Court interpretations of the words, "majority of the stockholders." The short answer is that stockholders *own* corporations to the extent of their stockholdings. Delegates do not *own* the union or its membership. It is some index of their arbitrary use of power that Petitioners resort to an analogy based upon *proprietary rights;* as if delegates had a proprietary right in the union membership. A right of property control like that of stockholders would make union members pawns of delegates in a game in intra-union

* The Federalist No. 22, p. 82; No. 54, pp. 171-172; *Gray* v. *Sanders*, 372 U. S. 368.

politics which is neither *democratic* nor *representative* in any valid sense.

Petitioners are of the opinion that "the stockholder situation provides an informative analogy in construing §101 (a) (3)" (Brief, p. 23). The Court below (apparently relying upon the obvious facts that the stockholders collectively *own* the corporation; and that Convention delegates do *not* own a union) stated (R. 185): "voting by stockholders of corporations is not, we think, an analogous situation."

Petitioners, in differing from the Court below on this point, quote Senator Kuchel: "A union member will receive statutory *protection* for his *rights as a member* in *much the same way* that a stockholder in a business corporation is *protected* by law in his *rights as a stockholder.*" (Brief for Petitioners, p. 23; emphasis added.)

The only analogy which the Senator makes in the quoted sentence is an analogy which concerns statutory *protection of rights.* Just as the *rights of the stockholder* are *protected* by law, so now under LMRDA, are the *rights of union members* protected by law. There is nothing in Senator Kuchel's language which suggests anything about an intra-union method of voting. The conduct of the 66th AFM Convention respecting "RECOMMENDATION No. 11" was such as to deprive the *members* of the union of virtually every possible *protection* or even *opportunity for protection.* They knew nothing whatever of the proposal that was steered through the Convention. They had no opportunity to instruct themselves or their delegates or to express their wishes to their "representatives". If, for this limited purpose of *protection of rights*, the analogy with the stockholders' meeting is appropriate, on petitioners' theory the situation of AFM members *vis-a-vis* the Convention was precisely like the situation of a stock-

holders' meeting attended only by *proxies* who *represent* the stockholders not previously informed as to the agenda of the stockholders' meeting. If the officers of the corporation suddenly presented to the assembled proxy holders a proposed resolution (like a rabbit out of a hat) at an evening session, asking the proxy holders to vote upon the proposition after midnight; then the analogy of union members with stockholders would be appropriate. Under such circumstances, the shareholder could not honestly be said to participate in the corporation's legislative power; and the manner in which the stockholders' meeting was conducted in this analogous and hypothetical case gave no opportunity for "the allocation of legislative power among the members of • • • [the] organization" (Petitioners' Brief, p. 23).

The common, if not universal, practice of allowing voting by shares in private business corporations has no better analogy with the 66th Convention *under the AFM Constitution* than it has with the House of Representatives *under the United States Constitution.*

8. **There was no genuine "vote of the delegates".** The Court below fully justified its decision by the portion thereof quoted at pages 43-44 of Petitioners' Brief. Those who ran the Convention had, under union "laws", an array of five choices of voting methods. Thus, they had alternative tools for managing Convention delegates. The voice-vote method was used twice unsuccessfully (R. 115). A member who asked for a ballot-vote at a more reasonable time (the next morning) was sidetracked by the Presiding Officer of the Convention (R. 115). The Presiding Officer misrepresented the request for a *ballot-vote* to mean a "roll-call" vote, despite the fact that a "roll-call" vote had not been used by the AFM for some 20 years; and despite the fact that the Chair had not candidly announced the outcome

of the voice-vote (R. 98). Prearrangement was evidenced by the instantaneous manner in which the Chair recognized Merle Snider (R. 115), in order to put the "roll-call" vote into operation (under the false guise of giving to the unnamed delegate what he had asked for, namely, a ballot-vote). Such artifice and skullduggery fully warranted the Court's declaration that the voting violated the statute; as did the very text of Article 5 of the AFM Constitution.

In any event, it cannot be said that the vote was really a vote "of the delegates", taking that phrase without qualification. It was a vote of *delegates metamorphosed and vastly multiplied* by membership weightings used in part to hide a purely *verbalized* or *conceptualized* but non-existent "participation by the membership." The members merely lent their *number* as a factor with which to multiply the *delegates' individual choices*, thus disguising them beyond recognition as a vote "of the delegates." The Court below properly indicated that Congress was "admittedly bent on expanding democracy" (Petitioners' Brief, p. 44), an intention which interdicted *unequal representation* such as exemplified at the 66th Convention. It was *unequal* because no two delegates had the same value attached to their ballots. It was not *representation*, because the people "represented" (the members) had no knowledge whatever of what was at stake and had not been given an opportunity (by previous notice such as AFM By-laws themselves required) to inform themselves, to deliberate, or to discuss Convention agenda and to instruct their delegates respecting some or all of such agenda. It was not *representation* because the delegates ("representatives") *themselves* had no previous opportunity for study, deliberation, discussion or consultation among themselves or with their constituents. Capacity to "represent" was debilitated or discouraged by the lateness of the hour and by the limitation on debate

imposed by a cloture limiting the speakers to 15. Only 15 delegates out of more than 1219 were permitted to debate the "burning question" (Proc. 31) and 9 of the 15 were chosen by the Chair to favor the Recommendation. For these reasons Petitioners' Brief (p. 44) errs in insisting that the Court below "reduced reasoning to absurdity". Nor does it matter, as Judge Marshall puts it in his dissent, that there is "no support for the majority's suggestion that dues increases are a *particularly* fertile field for skullduggery" (emphasis added). The majority opinion did not use the adverb "particularly". It is enough that Congress intended to prevent future skullduggery in what had been a fertile field of increasing dues, initiation fees and assessments without membership knowledge participation, as illustrated by the 66th AFM Convention.

The majority opinion below did *not* outlaw a method "which assured equality of representation" (Petitioners' Brief, p. 44). It outlawed a method devoid of both *equality* of representation and of *representation* itself.

Nothing in the legislative history suggests that, as Petitioners aver, "Congress intended the widest possible preservation of established union procedures or practices" (Petitioners' Brief, p. 45). Such an intention would have made the statute unnecessary.

The majority opinion allows ample room for responsible unionism without bureaucratic controls or racketeering. It curbs bureaucratic controls and racketeering by encouraging veritable membership participation according to James Wilson's formula for "equal elections" (*infra*, Section 10). It leaves in the hands of union members and officers the basic responsibility for running unions honestly and democratically. If some Locals are larger in membership than others, it suggests the advisability of proportioning the *number of delegates*, according to some reasonable

ratio, to the *number of members*. This widens representation prudently and tends to make it more responsive to membership needs. It prevents concentration of power in the hands of too few delegates. It multiplies opportunities for healthy difference of opinion and for averaging of the views of delegates.* It makes it very difficult, for union dictators to control a convention in league with powerful delegates. It makes true *representation* more likely by spreading the responsibility of representation among a larger number for the larger Locals, thus creating opportunities for wholesome rivalry in adequate representation. (Why should *two* delegates from Local 802 be allowed to cast 28,438 votes?) It represents, so far as the statute is concerned, a true "vote of the delegates" without qualification. Finally, it is a thoroughly *democratic procedure;* because, instead of putting the membership weighted vote in the hands of one, two or three delegates, it spreads that vote among a larger number, proportioned to the actual number of members represented at a convention.

If, as Petitioners argue (Brief, p. 47), "existing union constitutions and bylaws are themselves a product of that democratic self-government which the Act is designed to

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* Aristotle, "*Politics*," Book III Chapter 11, Volume 9, p. 479:

> "* * *, The principle that the multitude ought to be supreme rather than the few best is one that is maintained, and, though not free from difficulty, yet seems to contain an element of truth. For the many, of whom each individual is but an ordinary person, when they meet together may very likely be better than the few good, if regarded not individually but collectively, just as a feast to which many contribute is better than a dinner provided out of a single purse. For each individual among the many has a share of virtue and prudence, and when they meet together, they become in a manner one man, who has many feet, and hands, and senses; that is a figure of their mind and disposition. Hence the many are better judges than a single man * * *; for some understand one part, and some another, and among them they understand the whole. * * *"

ensure", there would have been no need for the statute; nor for the widespread changes in union constitutions and by-laws made in 1959 to conform with statute. No vestige of self-government is discernible in the "roll-call" vote which enacted RECOMMENDATION No. 11; since the members who were, on this false theory, "governing themselves" made no decision whatever. Nor could they, because the choice presented *to their "representatives"* had never been intimated to them by any form of previous notice.

The Court of Appeals' decision strikes a blow in defense of union democracy.* It does not, as Petitioners suggest (Brief, p. 51), destroy "the right of members to equal representation" and "the basic right of union members to govern themselves." It is in fact an application of the statute to a rarely used AFM procedure under which union members could not possibly govern themselves; and whereby they are expressly deprived of "the basic right to govern themselves". They are, in fact, made to surrender self-government to uninformed "representatives" who, by the Chair's rulings and the lateness of the hour, were effectually incapacitated from acting as *genuine* representatives. Petitioners themselves prevented the members from enjoying *representation* by refracting, for example, the choices of 28,438 members through the lone judgments of *two* delegates from Local 802. There was no element of self-government here; no opportunity even for information pertinent or essential to the basic right of union members to govern themselves. Self-government, in the matter of undisclosed dues increases, is jejune verbalism.

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* Respondents in their "Brief for Respondents in Opposition to the Petition for Writ of Certiorari" deal (pp. 13-14) sufficiently with Leiserson's book entitled "*American Trade Union Democracy*". For a critique of Judge Marshall's dissenting opinion, the Court is respectfully referred to Point I (pp. 11-27) of the same "Brief for Respondents in Opposition".

9. **Majority Rule.** The "roll-call" vote used for the first time in more than 20 years at the 66th Convention repudiates the true meaning of *majority rule*. You get out of a voting procedure only what you put into it. There is no magical increment. It is an accepted and characteristic example of democratic government that "the majority have a right to act and conclude the rest".* No government, indeed no society, can wait for, or operate on the principle of, unanimity. That is why *majority rule* is needed.

But the rightness or wisdom of an organization's policy cannot be determined *solely* by *counting votes*. Especially is this true where the tally reckons only the choices of the relatively few who "represent" the membership. In other words, use of majority rule, properly understood, does not imply that we neglect the *quality* of judgment because of sole reliance on a quantitative method.

Democratic principle exacts submission to the reasoned judgment and prudence of the majority. It is not a fetish regard for the majority just because it is numerically superior. In the May 23, 1952, issue of "*Commonweal*", John H. Hallowell put the matter thus:

> "• • • We are obligated to submit to the decision of the majority not because that decision represents a numerically superior will but because it represents the best judgment of society with respect to a particular matter at a particular time. It is founded not upon the principle that the will of the many should prevail over the will of the few but rather upon the principle that the judgment of the many is likely to be superior to the judgment of the few. • • •

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* "*Concerning Civil Government*", by John Locke, Chap. VIII §95, *ibid.*, Volume 35, p. 46; "*The Federalist*" No. 22, p. 82; "*A General Theory of Authority*" by Yves R. Simon, U. of Notre Dame Press, 1962, pp. 31-50.

"The principle of majority rule is founded upon the belief that the widest possible popular discussion and deliberation is likely to yield wiser decisions than a discussion limited to the few. * * * Democracy attempts to implement the principle that government should rest upon the consent of the people by making provision for the widest possible popular deliberation and participation in the formulation of public policy. * * * The majority vote does not precede deliberation but records a decision reached through deliberation. * * *

"Majority rule, then, presupposes widespread discussion and deliberation and presupposes that the discussion will be conducted in the most reasonable manner possible, to the end that policy may be framed in the interests of the common good. * * *

"* * * To the extent, therefore, that the rule of the majority becomes more an expression of will and less an expression of reasoned judgment, to that degree does it become less democratic and more tyrannical.

"The democratic process is designed to determine by popular discussion and decision the choice of the best means to achieve common ends shared by all. * * *" *The Meaning of Majority Rule*, pp. 167-168.

10. **The *Wesberry* case and James Wilson.** James Wilson, an active member of the Constitutional Convention and later Associate Justice of this Court, in a lecture at Philadelphia, stated:

* * * all elections ought to be equal. Elections are equal, when a given number of citizens in one part of the state, choose as many representatives, as are chosen by the same number of citizens in any other part of the state. In this manner, the proportion of the representatives and of the constituents will remain invariably the same. (2 The Works of James

Wilson (Andrews ed. 1896) 15; quoted in *Wesberry, Jr. et al.* v. *Sanders et al.*, U. S. ; 32 Law Week 4142.)

The analogy between the foregoing comment on "constitutional representation" and representation of Union members by delegates at international conventions is manifest. The same correct, democratic or representative procedure required for such "equal elections" was probably the aim of Congress in §101(a)(3); in view of Mr. Meany's statement that this section of the statute permitted what unions *generally* require; and in view of the examples provided by the House of Representatives and most unions. The AFM "roll-call" vote is not reconcilable with James Wilson's view of "equal elections." But Wilson's rationale is entirely consistent with the majority opinion below. The statutory rule "one person, one vote", has sound historical and philosophical antecedents. This Court recently reaffirmed it in the area of Constitutional Law. *Wesberry, Jr., et al.* v. *Sanders et al.*, U.S. ; 32 Law Week 4142; *Gray* v. *Sanders*, 372 U. S. 368.

11. **Basic theory and philosophical appraisal.** There is an analogy of proportion between voting rights and other democratic rights of *citizens* under their government and voting rights and other democratic rights of *union members* under union government. As was stated in *"The Federalist"* (No. 55):

> In general * * * no political problem is less susceptible of a precise solution than that which relates *to the number most convenient for a representative legislature;* nor is there any point on which the policy of the several States is more at variance, whether we compare their legislative assemblies directly with

> each other, or consider the *proportions which they respectively bear to the number of their constituents*. (Emphasis added; Volume 43, p. 172.)

Later on in the same *Federalist* (No. 55), appears a statement which is completely neglected, despite its obvious truth, in the Brief for Petitioners as well as in the Briefs of the *amici curiae*:

> • • • Nothing can be more fallacious than *to found our political calculations on arithmetical principles.* Sixty or seventy men may be more properly trusted with a given degree of power than six or seven. • • • The truth is, that in all cases a certain number, at least, seems to be necessary *to secure the benefits of free consultation and discussion*, and *to guard against too easy a combination for improper purposes;* as, on the other hand, the number *ought at most to be kept within a certain limit, in order to avoid the confusion and intemperance of a multitude.* In all very numerous assemblies of whatever character composed, passion never fails to wrest the scepter from reason. • • • (Emphasis added; p. 173.)

Petitioners and *amici curiae* seem to think it self-evident that genuinely "democratic" procedures are fostered by an arithmetic voting procedure which allows, for example, two representatives of Local 802, to cast in excess of 28,438 votes; while two representatives of Local No. 50 are permitted to cast 137 votes. Numerical arrangements of this sort do not guarantee democratic rights or procedures. This is clear from what actually occurred at the 66th Convention. It is also evident from philosophic considerations such as those to be found in the following passage from John Locke's essay "*Concerning Civil Government*", Volume 35, Chapter IX, Section 215:

> . . . For it is not a certain number of members, nor their meeting, *unless they have also freedom of debating and leisure of perfecting what is for the good of the society*, wherein the legislative consists; *when these are taken away, or altered, so as to deprive the society of the due exercise of their power, the legislative is truly altered.* For *it is not names that constitute governments*, but the use and exercise of those powers that were intended to accompany them; so that *he who takes away the freedom, or hinders the acting of the legislative in due seasons, in effect takes away the legislative, and puts an end to the government.* (Emphasis added.)

In the light of such principles, what democratic virtue characterized the AFM Convention in weighing the votes of 1,219 delegates by the number (280,000) of members represented by the respective delegates? There was no discussion, no deliberation worthy of the name at the Convention. There were neither deliberation nor discussion by the members in any sense. *The constituents were not informed in advance of the important issues to be considered by their "representatives". The "representatives" themselves received no notice in advance sufficient to allow them freedom of debating and leisure of perfecting what is good for the society.*

The conclusion that RECOMMENDATION No. 11 was ramrodded through the Convention is inescapable from analysis of the "OFFICIAL PROCEEDINGS" of the 66th Convention published by the AFM.

Not only did the delegates themselves receive no adequate prior notice of RECOMMENDATION No. 11, on which they were asked to vote at a midnight session; they were limited in their ability to debate the matter. They did not even learn of the existence of RECOMMENDATION No. 11 until approximately six hours before the moment when they were

asked to vote upon the proposition; and during those six hours they sat in convention listening to the Chair and to 15 speakers—so that they could scarcely study the RECOMMENDATION with attention. The members "represented" by the delegates learned about the entire matter *ex post facto*. They were presented with a *fait accompli*.

Thus, with respect to the membership of 280,000, there was utter violation of the sound and important principle to which Hamilton or Madison referred in "*The Federalist*" (No. 56):

> It is a sound and important principle that *the representative ought to be acquainted with the interests and circumstances of his constituents*. But this principle can extend no further than to those circumstances and interests in which the authority and care of the representative relate. An ignorance of a variety of minute and particular objects, which do not lie within the compass of legislation, is consistent with every attribute necessary to a due performance of the legislative trust. *In determining the extent of information required in the exercise of a particular authority, recourse, then, must be had to the objects within the purview of that authority* (p. 174; emphasis added).

The AFM President had frequently promised the membership by publications appearing in the official organ of the Federation ("*The International Musician*"), that the fiscal problems caused by the *Cutler* case were matters of first magnitude, which would be fully discussed and debated at the Convention. However, Mr. Kenin and his associates waited until six hours before the vote to unveil their proposal for dealing with these weighty matters; and then the delegates had to decide whether to attend to the Convention proceedings or to the text of the RECOMMENDATION.

The dissenting opinion in the court below very properly deplored a too multitudinous assembly for union convention purposes. "*The Federalist*" (No. 58) beautifully expresses such concern, with, however, a more precise and careful understanding and expression of its true rationale:

> • • • the more multitudinous a representative assembly may be rendered, the more it will partake of the infirmities incident to collective meetings of the people. Ignorance will be the dupe of cunning, and passion the slave of sophistry and declamation. *The people can never err more than in supposing that by multiplying their representatives beyond a certain limit, they strengthen the barrier against the government of a few.* Experience will forever admonish them that, on the contrary, *after securing a sufficient number for the purposes of safety, of local information, and of diffusive sympathy with a whole society*, they will counteract their own views by every addition to their representatives. The *countenance of the government may become more democratic, but the soul which animates it will be more oligarchic.* The machine will be enlarged, but *the fewer, and often the more secret will be the springs by which its motions are directed* (p. 181; emphasis added).

The foregoing classic reasoning can be paraphrased so as to make it apply to what actually transpired at the 66th AFM Convention. There, ignorance was indeed the dupe of cunning; because the *members* were *entirely* ignorant of what was going forward; and the *delegates* were ignorant of the proposed RECOMMENDATION No. 11 until six hours before they were asked, insufficiently prepared as they were, to vote upon it at an "Evening Session" which lasted far beyond midnight. Petitioners can never err more than in supposing that by multiplying the number of ballots cast

by the individual delegates, they increased the *democratic character of the procedure*. Actually, they are merely strengthening "government of a few"; namely, government and control of the Convention by the delegates representing the most populous Locals. They were merely providing another means for manipulating votes, after two tests of voice votes showed that the delegate majority was intractable. There was no opportunity afforded to the *delegates* or to the *members* for deliberation, discussion, "local information", nor for giving play to "diffusive sympathy with the whole society", whose unsuspecting members had no intimation of RECOMMENDATION No. 11. There was the "countenance of democratic government" in what occurred at the 66th Convention. But the "soul that animated it" was all the more oligarchic. The number of ballots was enlarged. But the delegates who controlled that enlarged number of ballots remained the same (1,219 out of 280,000 members). The more secret the springs by which the individual decisions of the 1, 2 or 3 delegates in each delegation were activated, the more the form of "representation" was *aped* and the true meaning of majority rule was repudiated.

12. **The meaning of "democratic".** Petitioners resort to the word "democratic" as if it were a word to conjure with,—a shibboleth whose established or traditional meaning had never shifted. The authors of "The Great Ideas, A Syntopicon" (Vol. 1, Chapter 16, p. 303) present, in an essay entitled "Democracy" a synthesis of their readings from the great, seminal books of the Western Tradition on this subject. The following is quoted from that essay:

> "Of all the traditional names for forms of government, 'democracy' has the liveliest currency today. Yet like all the others, it has a long history in the

literature of political thought and a career of shifting meanings. * * *

"In our minds democracy is inseparably connected with constitutional government. We tend to think of despotism or dictatorship as its only opposites or enemies. * * *

"Throughout all these shifts in meaning and value, the word 'democracy' preserves certain constant political connotations. Democracy exists, according to Montesquieu, 'when the body of the people is possessed of the supreme power'. As the root meaning of the word indicates, democracy is the 'rule of the people'. * * * In the development of the democratic tradition, particularly in modern times, this has been accompanied by the elaboration of safeguards for the rights of man to assure that government actually functions for the people, and not merely for one group of them.

"* * * The specifically democratic element is apparent from the fact that throughout the many shifts of meaning which democracy has undergone, the common thread is the notion of political power in the hands of the many rather than the few or the one * * *" (p. 303).

What happened at the 66th Convention substantiates that the voting power of the large Locals was controlled by the independent, untrammelled discretion of *two* or three delegates. This was not government for the people; but government of and by a small group of "representatives", who were themselves practiced upon by those who beguiled the Convention. Their procedure was rouged here and there with a *verbal* cosmetic: "democracy".

John Stewart Mill, in his "*Representative Government*", identifies democracy with the ideal state:

> "The ideally best form of government is that in which the sovereignty, or supreme controlling power,

> in the last resort, is vested in the entire aggregate of the community, *every citizen not only having a voice in the exercise of that ultimate sovereignty, but being, at least, occasionally, called on to take an actual part in the government* by personal discharge of some public function, local or general. (Emphasis added; Volume 43, p. 344.)

Such a description has nothing in common with the maneuvers of the 66th Convention.

Respondents make no argument that a "representative" should be "reduced to the ignominious role of a mouthpiece". J. S. Mill properly deprecated the two extremes: (i) where the representative acts on his own without regard to any responsibility toward his constituency and (ii) where the representative slavishly grovels before the will or whims of his constituency. Says the "*Syntopicon*" (*supra*):

> "Between these two extremes, Mill tries to find a middle course, in order to achieve the 'two great requisites of government': *responsibility to those for whose benefit political power ought to be, and always professes to be, employed*: and jointly therewith to obtain, in the greatest measure possible, for the function of government the benefits of superior intellect, trained by long meditation and practical discipline to that special task" (p. 307; emphasis added).

13. **The decision below does not conflict with other provisions of the Act.** The reading given to LMRDA §101 (a) (3) by the Court of Appeals in the light of the facts in this case is the only reading which does not conflict with other provisions of the Act. There is no basis in the concepts (Sections 9, 10, 11 and 12, *supra*) of *majority rule, democratic procedure* or *representative government of*

unions for giving to delegates the voting strength of their memberships, where such memberships are sublimely ignorant of everything under discussion. The very words, "democratic procedures" or "representative procedures", imply some sort of *participation* by *knowledgeable* constituents, or at least by constituents with the *opportunity for obtaining knowledge*. They presuppose consideration, deliberation, discussion. It is empty rhetoric to suggest that the AFM constituents were beneficiaries of *representative government* or *democratic procedure* in respect of the passage by the 66th Convention of RECOMMENDATION No. 11; especially where their representatives could be overruled by a committee of AFM officers and committee chairmen (AFM Constitution, Art. 5).

14. **Title IV of LMRDA is irrelevant.** Title IV of LMRDA has nothing to do with this case. The problem of voting at a Union convention for the purpose of increasing dues or initiation fees in a manner consistent with democratic membership participation is totally different from the problem of democratic elections of Union officers. In elections of Union officers, the indisputable objective is to make the name of the candidate widely known among the members. Candidates' names are never secrets. There was never any union abuse by Union officials trying to keep their candidacies from being known. But there were, previous to the Landrum-Griffin Act, many union abuses by dues increases and increases in initiation fees arranged clandestinely. Congress did not attempt to specify in statutory detail the organizational structures or the minute rules of representation which unions must adopt. Congress did provide a legal standard of judgment for appraising such structures and systems, both in the abstract and in the concrete: Is the union organizational structure and

its system of representation consistent with the goal of safeguarding *genuine democratic procedure within the union* and *truly representative union government* respecting dues and initiation fees?

There is nothing in the "one delegate, one vote" rule which prevents unions from achieving these congressional ends *by proportioning the number of delegates to the number of members* (as is done in the House of Representatives). Where delegations are proportioned to the number of members; and where the members themselves or their locals receive adequate prior notice; a truly democratic or representative system of non-discriminatory voting is insured. Such a rule of "one delegate, one vote" follows the James Wilson ideal (supra, Section 10) of "equal elections". According to the AFL-CIO Brief's questionable Appendix, 19 out of 131 International Unions use the "roll-call" vote method employed by the 66th AFM Convention. There is no way of ascertaining from the AFL-CIO Appendix or from the studies made by the Bureau of Labor Statistics and the National Industrial Conference Board whether weighted voting in *other* unions is given a democratic or representative cast by ancillary provisions requiring fair previous notice of proposals to increase dues and initiation fees. Whatever the facts in this respect (the Record presents no evidence on the point), it should be clear from the legislative history of §101 (a) (3) LMRDA that Congress did not intend the kind of weighted voting system which makes democratic procedure or representative government impossible, as did the AFM "roll-call" vote at the 66th Convention. That AFM system (not 130 other union systems) is our concern on this appeal.

What Congress thought relevant to the *election of officers* on the one hand and what it thought pertinent to

dues increases on the other are two different things. Petitioners (Brief, p. 42) argue that no such considerations "are available"; but they are: (a) A union officer cannot possibly be elected, unless there is previous notice of the election. Dues increases can be effectuated by union officials without previous notice. (b) Officers cannot be elected unless the membership knows them or at least knows their names and the fact that they are candidates. An increase of dues can be put into union by-laws without the knowledge of the members. (c) Officers *need* members in order to be elected. Before the Landrum-Griffin Act, union officers did not need members in order to foist upon them the burden of increased dues; union officers could mandate increases without the help of members. (d) Candidates for union office have every motive to broadcast their candidacy before election. Union officers who want to impose a dues increase dictatorially have, generally, every motive to hide their purpose *before* the imposition. (e) So far as previous notice to and knowledge of the membership are concerned, union by-laws generally provided satisfactory election procedures before the Landrum-Griffin Act. The same was not true as to by-laws *re* notice to members of the purpose to increase union dues. (f) In electing union officials against the members' wishes, a union dictatorship can work only by some plan of *rigged election*. In increasing "dues" (*before* the Landrum-Griffin Act), union dictatorships had no difficulty about imposing dues increases. The project to increase dues is not so easy *since* the Act came into effect.

The foregoing six contrasting considerations show that Congress had good reason to differentiate statutes respecting the *election of officers* from statutes permitting *dues increases*.

15. **Abuses concerning union dues.** If it be true that neither the President nor the Secretary of Labor suggested that "the methods for raising dues had been the subject of any abuse" (Petitioners' Brief, p. 42), that is certainly not the case with respect to the McClellan Committee, as Petitioners' own Brief admits (p. 25, footnote 23; 33; 48, footnote 72; 49). Congress had evidence of numerous instances where union dues were increased by the arbitrary fiat of union leaders, without the knowledge or control of the members.

16. **Undemocratic control by the few.** Most of the delegates at the AFM 66th Convention voted against RECOMMENDATION No. 11 (R. 103; Proc. 7-30; 58-63). Out of more than 605 Locals (Proc. 30) only *four* have more than 5,000 members each. Yet these *four* locals, under the voting procedure defended by Petitioners, acting by the personal preferences of from four to twelve delegates (depending upon the presence of full or partial delegations at the Convention) controlled *60,394 votes. In addition to the four Locals just referred to,* 11 AFM Locals, represented by from 11 to 33 delegates, each have 2,000 members or more. Thus, under the "roll-call vote" procedure, a maximum of 45 delegates (and a minimum of 15 delegates) controlled 91,687 votes. If, to the statistics relating to the 15 Locals just referred to, one adds all AFM Locals having 1,000 or more members, the following conclusion is necessitated: 37 AFM locals out of 675 have from 37 to 111 delegates who control 121,180 ballots out of a total of 271,811 ballots. (The foregoing computations are based on Proc. 7-30; 58-63.) This is scarcely a democratic or representative voting system. For all practical purposes, it is a system which concentrated control over a convention of 1,219 delegates in the hands of *111* delegates (and on the

basis of sufficient absenteeism it could be 37 delegates) who decide, according to their own personal judgment and without the slightest notice to the members they purport to "represent", how they will vote or how they will split their votes. In the process, they multiply the 37 to 111 personal choices (of as many delegates) to arrive at a product of 121,180 votes or ballots, entirely subject to their unlimited control! On top of that comes the admitted vote-splitting and vote duplication described in Respondents' Counterstatement of Facts.

17. **Representation by reasonable ratio.** Using a reasonable ratio of *one* convention delegate for each 250 members, *after initial assignment of one delegate for the first 150 members*, the number of delegates needed (under the weighted voting system "generally" used according to Mr. Meany, R. 110-111) to represent 280,000 members would be about the same as the number (1,219) who actually attended the 66th Convention. In other words, Judge Marshall's fears that the decision on appeal would require 14,000 delegates to represent 280,000 AFM members at a cost of $5,200,000 is utterly without foundation. See ¶15 pp. 26-27 and ¶20 pp. 28-29 of Respondents' "BRIEF FOR RESPONDENTS IN OPPOSITION".

18. **The mere appearance of democratic and representative method.** Petitioners take the following passage from the Court of Appeals decision and draw from it more than its wording warrants:

> Moreover, as appellants claim to be the case, the weighted voting is *to all appearances* the most "democratic" method *in the sense that* each member is duly "represented" and it is a method of voting widely recognized as fair and * * * proper by a number of unions (italics added).

The italics make it possible to distinguish between *appearance* and *reality*. The words in quotation marks suggest judicial doubt on the question whether the procedure was *really* (as contrasted with *verbally* or *by appearance*) "democratic" and whether each member was in fact "represented". The appearance or "countenance" of democratic method is not the same as its reality and "soul", as *"The Federalist"* quoted above shows (Section 11, *supra*). What happened at the 66th AFM Convention was certainly not "democratic" *in any sense of membership participation.* Nor were the members "represented"; because representation on an issue of this type required in the "representatives" opportunity for study, deliberation and discussion; and in the "represented" notice prior to the Convention respecting RECOMMENDATION No. 11 so as to give them opportunity to decide whether they would vote to instruct their delegates. It is common practice for locals to send delegates to an international union's convention with instructions (i) how they are to vote on particular issues and (ii) for whom they are to vote in convention elections. The abuses which prompted Congress to regulate the matter of dues increases were not to be corrected by mere mathematical weighting of ballots. Congress obviously wanted the members to be informed in advance of plans to increase dues and to have at least the chance to participate in the decision; so that dues increases would not be arbitrarily imposed by intra-union dictatorship.

19. **Violation of §101 (a) (1) of LMRDA.** Delegates to AFM Conventions are, of course, AFM members. Section 101 (a) (1) of LMRDA provides: "Every member of a labor organization shall have *equal rights and privileges* within such organization • • • *to participate in the deliberations and voting upon the business of* • • • *meetings*, subject

to reasonable rules and regulations in such organization's constitution and by-laws" (emphasis added). The "roll-call vote" at the 66th Convention flouted this statutory mandate. Only fifteen delegates were permitted "to participate in the deliberations" (Proc. 58). None enjoyed "equal rights and privileges" within the Convention "to participate in * * * voting" on RECOMMENDATION No. 11. Some delegates had as few as 31 (Local 261; Proc. 60) votes while other delegates had thousands of votes (Locals 4, 5, 6, 8, 9 and 10; Proc. 58).

20. **Petitioners' reliance on "evidence" not in the Record.** Petitioners and their allies, as well as the dissenting Judge below, assumed without support from the Record and without trial (in which such generalized assumptions could be subjected to probing examination and cross-examination), that *similar weighted voting systems* are permitted or required by many allegedly representative union constitutions prior to enactment of LMRDA; and that under the majority opinion below each local may not be *represented* at conventions by delegates whose number is proportioned to the number of members of that local.

The AFL-CIO Brief introduces *factual evidence not in the Record*, in the form of an "APPENDIX" which summarizes (according to the unilateral interpretation of the draftsmen of the "APPENDIX") the "Voting Procedures on Finances Used by 131 AFL-CIO affiliates". Of the 131 AFL-CIO unions only 19 are alleged in this "APPENDIX" to have constitutions or bylaws which permit "Delegates at a convention [to] vote the membership they represent" (AFL-CIO Brief, pp. 16-23). Mr. George Meany's affidavit (R. 110-111) states: "* * * most other international unions" achieve *weighted voting* by sending to conventions a "*number of delegates* * * * based on the number of members in

the Local" (emphasis added). Mr. Meany's conclusion in this respect seems to contradict the "APPENDIX" (which is not in the Record):

A system which sends to conventions numbers of delegates proportioned to the numbers of members in the represented Locals is democratic and representative. It is a ***weighting*** **of** ***locals*** **entirely consistent with the opinion below. It avoids concentration of power in a few delegates—the necessary consequence of yielding to a small number of delegates a large number of votes.**

21. **Majority of delegates versus majority of ballots.** Petitioners (Brief, p. 20) complain that the Court below treated the phrase, "by majority vote", as if "majority" modified "delegate", a "reading which renders the word 'vote' entire superfluous". The rule "one delegate, one vote", necessarily makes it a matter of indifference whether you count a majority of the *delegates* or a majority of the *votes*.

Petitioners made the words, "vote" and "delegate", meaningless by their interpretation: "Just as Congress left each union free to determine by its by-laws the number and qualification of convention delegates, so did it allow them to determine the number of votes those delegates should cast" (Brief for Petitioners, 20). If a union could thus "determine the number of votes" its "delegates could cast", it could, by changing the rules of the game during the game, win every election and every vote by assigning weights as it pleased to the delegates' ballots. The AFM officers, having perceived from two *voice votes* that they could not thereby enact RECOMMENDATION No. 11, resorted to an apparently previously prepared strategy. The unwonted method used worked in such a prompt, pat and neatly-executed manner that previous planning was indi-

cated. The "roll-call vote" (never used in more than 20 years of annual conventions) was used instantaneously after the voice vote had twice failed (R. 115-116). Two strike-outs with voice-vote procedure ended in a home-run with the "roll-call" procedure.

22. **The irrelevance of S. 1137.** Because Petitioners give a truncated view of the legislative history of §101(a)(3), they referred to the fact that S. 1137, §104(2), introduced by Senator McClellan, would have *required* some form of weighted voting at international conventions. Actually, as the *two* following quotations from S. 1137 show, the Senator had respect for the *spirit* rather than the mere *countenance* of democratic procedure:

> (2) VOTING AT CONVENTIONS—All delegates elected or designated by the constituent units of an international labor organization • • • to represent such constituent unit at any meeting or convention • • • shall have a vote in all elections for officers and upon other matters brought before such meeting or convention • • • which vote shall be numerically equivalent, or proportionate, to the number of members of such constituent unit • • • (1 Leg. Hist. 278)

[If Senator McClellan had stopped there, Petitioners' invocation of his proposal might have aided their theory on this appeal. However, the Senator did *not* stop there. He knew that a merely mathematical assignment of weights to votes cannot possibly guarantee democratic procedure. The very next paragraph of the Senator's proposal, *which Petitioners did not quote*, reads:]

> (3) NOTICES OF MEETINGS OR CONVENTIONS—Not less than 30 days prior to any meeting or convention of any international labor organization for the elections of officers, directors, trustees, or members of an Executive Committee, a notice shall be sent by

> mail to the secretary of each constituent unit of such organization, which notice shall set forth the time, place and a detailed agenda of such meeting or convention.

The provisions just quoted, requiring notice of a "detailed agenda for such * * * convention", is related to the phrase in the previous paragraph of the quotation: "*to represent such constituent unit* at any * * * convention."

Only if the constituent units, and thus the membership, receive notice of what is going to be acted upon at the Convention can there be genuine *representation* of constituent units or memberships of Locals. That is precisely what did not occur at the 66th AFM Convention, of whose business the constituent units were unapprized.

Petitioners (Footnote 8, Brief, p. 7) refer to the June, *1964*, AFM Convention. *Previous notice of the detailed agenda of the 1964 Convention* was sent to all delegates as required by AFM By-laws. This requirement had been violated respecting the *1963* Convention and RECOMMENDATION No. 11 (R. 80-100, esp. 94-98).

***Democratic* or *representative* procedures *are* insured by** a system of weighting whereby the *number of delegates* is proportioned to the *number of members* in the Local represented by those delegates; just as they might be safeguarded under S. 1137 (had it been passed by Congress) by a system which enabled single delegates to cast votes numerically equivalent or proportionate to the number of members in the Locals, *so long as the Locals are given fair prior notice of the detailed agenda of the Convention*, giving to Local memberships at least *opportunity* to call local meetings for the purpose of instructing the delegates.

There is no reason to believe that Senator McClellan would have been satisfied with §104(2) unless it was accompanied by §104(3).

It is significant that in neither §101(a)(3) of LMRDA nor the AFM Constitution and By-laws is there any requirement for "30 days' written notice to the principal office of each Local or constituent labor organization entitled to such notice" prior to a regular convention, such as there is for a "special" convention. Apparently, Congress did not think 30 days' previous notice was necesary because *most union constitutions provide for adequate previous notice of conventions and of convention agenda.* Therefore, it was not necessary for Congress to legislate such notice where regular conventions were concerned. Every union member knows when and where a national convention is going to be held months in advance; and the international union usually publicize the convention agenda long before the convention begins.

The following sections appear in Article 28 of the AFM By-laws:

> §4. *Delegates or locals desiring to introduce in the convention any resolution or measure must forward same, written and in duplicate, to the International Secretary, not later than fifteen (15) days before the day set for the first session* of the convention.
>
> (a) All such resolutions or measures *shall be printed and distributed to the delegates at said first session.*
>
> (b) In addition, delegates may introduce resolutions until 30 minutes after the closing morning session of the second day of the convention by presenting same to the Chairman.
>
> (c) All resolutions or measures shall be numbered consecutively and printed in compact pamphlet form. • • •
>
> §10. Printed copies of the annual reports of the President, Secretary, Treasurer, Auditor and any resolutions to be submitted at the convention by the Inter-

national Executive Board, if possible, shall be mailed to the accredited delegates to the Convention of the Federation, not earlier than three weeks and not later than two weeks before the opening session of the convention. • • •

§21. *No alterations or amendments to the Constitution or By-laws (except as is otherwise provided in the By-laws or ordered by a Convention) shall be made unless proposed in writing, and said alterations or amendments must receive a majority vote of the delegates present* to become law, unless otherwise provided. (emphasis added)

Although the problem with which the delegates were to deal had existed for several years (*Carroll* v. *AFM*, 295 F. 2d 484, (1961) 2d Cir.); *Cutler* v. *AFM*, 211 F. Supp. 433, S. D. N. Y.; *Cutler* v. *AFM*, 316 F. 2d 546, (2d Cir. 1963) *cert. den.* December 9, 1963); and although full discussion had been promised (Proc. 31; R. 77-78; 80-82); and although the matter was of momentous importance to the AFM, its Locals and its delegates (Proc. 31; R. 77-82); the foregoing provisions of the AFM By-laws were not complied with. No previous notice of RECOMMENDATION No. 11 was given to the membership, the Locals or the delegates prior to the Convention; and only the delegates received, *on the third day of the Convention*, previous notice of *six hours* respecting RECOMMENDATION No. 11!

23. **Mr. Meany's testimony.** What Mr. Meany said in his testimony before the Committee (Petitioners' Brief, p. 28) and the almost identical language in the "AFL-CIO ANALYSIS OF KENNEDY BILL (S. 1555) APPROVED BY THE SENATE (OFF. TEXT)" was, to quote the latter:

"If the Section is assumed to mean what its proponents said they thought it meant, it actually per-

> mits changes in dues and assessments in every way in which unions *generally* change dues or levy assessments, except action by a General Executive Board or similar body." (emphasis added)

This language is not correctly interpreted in Petitioners' Brief (pp. 12; 29): "that the Senate Bill did not forbid" *any of the accepted methods* of raising dues, except by the Executive Board * * *" (emphasis added) Petitioners' Brief omits the following italicized portions of the Meany statement:

> "§101(a)(3) actually permits changes in dues by every method *which unions generally employ* except action by a General Executive Board or similar body." (emphasis added)

Mr. Meany's statement simply means that the Senate Bill did not forbid any of the *"generally"* used methods of raising dues. To leave out the adverb, "generally", is to warp the meaning of Mr. Meany's words and to make them universal.

It begs the essential question to assume that the AFM "roll-call" vote is either "traditional" or "democratic" or that it is used by "scores of international unions". The Meany statement and affidavit and the "AFL-CIO ANALYSIS OF THE KENNEDY BILL" can hardly be construed as a statement *sponsoring* or *supporting* §101(a)(3), no matter in which Bill that section appeared. Mr. Meany was of the opinion that once the change with respect to (i) general executive board and (ii) the referendum vote was made, §101(a)(3) actually permitted "changes in dues by every method which unions *generally* employed." Nothing in the Record supports the proposition that §101(a)(3) requires changes in methods (of increasing or creating dues) which unions "generally" employ. The AFL-CIO

Brief by its Appendix seeks to introduce factual evidence, *as refracted by those who interpreted 131 AFL-CIO Constitutions*, without quotation of the actual language of the 131 Constitutions and without expert testimony, subject to cross-examination. New evidence should not be admitted in a case by means of an Appendix to a brief submitted to this Court. This is especially true where what is involved is the *interpretation* of analysts who prepared the Appendix sans quotation of the actual language interpreted, and sans evidence of practical construction.

24. **Petitioners' misapprehension of the majority decision below.** Petitioners' Brief (p. 29) errs also in the statement that "the House Committee's action conclusively demonstrates that it desired the widest latitude for unions to prescribe their own rules for raising dues as long as those rules allowed membership participation." The words, "widest latitude", are too broad. Petitioners seem oblivious of the limitation they themselves imposed by the clause, "as long as those rules allow membership participation." (Petitioners' Brief, p. 29). There was absolutely no membership participation in the 66th AFM Convention.

Respondents agree that it is not reasonable "to assume that the House Committee would permit dues increases to be made by the Executive Board but not by a convention vote *in which all members were fairly 'represented.*" (emphasis added; pp. 29-30, Pet. Br.). The whole thrust of the complaint is that the members were *not* "fairly represented"; and that the delegates were prevented from fairly *representing* the members through no fault of their own; because RECOMMENDATION No. 11 was kept under wraps until the last minute, and was then sprung upon the uninformed delegates six hours prior to the midnight session at which they voted upon it.

25. **Petitioners' authorities do not support Petitioners' contentions.** The House Committee Report and Representative Griffin, as quoted on page 30 of Petitioners' Brief, are unobjectionable. The one speaks of the right "to participate and decide upon rate of dues * * *" and the other affirms that union members are guaranteed "that their dues and initiation fees will not be increased arbitrarily * * *". The complaint alleges that the AFM members had *no right of participation in the discussion of* RECOMMENDATION No. 11. They were unaware of its existence. In all of the circumstances, RECOMMENDATION No. 11 increased dues and initiation fees "arbitrarily", by finessing RECOMMENDATION No. 11 through the Convention.

The quotation from Judge Marshall's dissent is equally inapposite; because in the instant case, as the complaint shows, the dues increases *were* "imposed by irresponsible and arbitrary union leaders not answerable in any way to the membership at large." Or, to put the matter in the language of the *Banes* case (*Banes* v. *Office Employees*, 317 F. 2d 1915, 1918), the AFM members had no genuine representation at the council table where the dues structures were changed.

Labor Board v. *Fruit Packers*, 377 U. S. 58, 71-72 (Petitioners' Brief, p. 32), is as irrelevant to Petitioners' purposes as Trevelyan's rocker. While the legislative history of the involved legislation provides no specifics, it does repeatedly provide two objectives (that members of unions deserve *genuine representation* and *veritably democratic procedures*) which, precisely because they are *ends*, measure and limit the *means* to accomplish such ends. The end to be achieved always dictates in some way the means or methods of achievement. The undisputed Congressional objectives require construction of §101(a)(3) to ban the AFM weighted voting system in all of the circumstances

of this case. Whatever *else* is genuinely representative and democratic, the 66th AFM Convention, in passing RECOMMENDATION No. 11, was neither.

By taking §101(2) of S. 1137 out of context and by neglecting §101(3), (Petitioner's Brief, p. 33-34) conjure up the theory that Senator McClellan's proposal grew out of certain abuses "uncovered by the McClellan Committee which can flourish under the rule of 'one delegate, one vote' *but are impossible where the delegate votes his full constituency.*" (emphasis added) The abuses to which Senator McClellan referred are especially possible where "the *delegate* votes his full constituency" without the slightest knowledge on the part of the constituency of what is at stake. There is *democratic* and *representative* character in a system which first gives reasonable notice of convention agenda to the members, thus allowing them opportunity to debate and to vote upon instructions to their delegates. There was no such democratic or representative character to the 1963 AFM Convention. For this purpose it does not matter (as Petitioners seem to think it does, Petitioners' Brief, p. 35) whether weighted voting was *allowed* or *required*. The trouble with Petitioners' reasoning in this connection is that Petitioners read §101(2) of S. 1137 "in splendid isolation" (Petitioners' Brief, p. 36).

POINT II.

Section 101(a)(3) of LMRDA as applied to defendants in this case does not conflict with the First Amendment.

The importance of judicial precedents has always been a distinguishing and well recognized characteristic of the Anglo-American system of law. In appraising a precedent

it is commonplace that one must distinguish betwen a *ratio decidendi* and *obiter dicta:*

> "The only judicial principles which are authoritative are those which are * * * relevant to their subject matter and limited in their scope. All others, at best, are of merely persuasive efficacy. They are not true *rationes decidendi*, and are distinguished from them under the name of *dicta* or *obiter dicta*, things said by the way. The prerogative of judges is not to make law by formulating and declaring it—this pertains to the Legislature—but to establish law by applying it. Judicial declaration, unaccompanied by judicial application, is of no authority." *Salmond on Jurisprudence* (8th edition) by C. A. W. Manning, London: Sweet & Maxwell Ltd. (1930), §60, p. 202.

It is not the function of this brief to discuss the *dicta* of the Court below. Plaintiffs-Respondents simply contend that *in the circumstances of this case and against the background of its peculiar facts and events*, the Court below properly interpreted and applied the statute to Petitioners and in no way violated the first Amendment.

It is the purpose of this Point to deal briefly with the insubstantial arguments made by Petitioners to show that, as construed below and as applied in this case, Section 101(a)(3) conflicts with the First Amendment.

A. With respect to this alleged question of constitutionality, Respondents contend that this Court should not "anticipate a question of constitutional law in advance of the necessity for deciding it." *Ashwender* v. *Tennessee Valley Authority*, 297 U. S. 288, 346-348. The complaint here (R. 26-41) seeks a declaratory judgment declaring

> "(A) that the aforesaid Convention procedure concerning 'Recommendation No. 11' was illegal and that the resolution in question (Recommendation No. 11) is null and void under the Act and under defend-

> ants' Constitution and By-laws; and (b) that the Resolution which purported to enact 'Recommendation No. 11' at said Convention * * * is null and void; and
>
> "(B) Preliminary and permanent injunctions enjoining defendants from carrying into effect the aforesaid resolution which purported to enact 'Recommendation No. 11' * * *".

It was defendants below (not plaintiffs) who brought the motion for summary judgment under Rule 56 of the Federal Rules of Civil Procedure. The District Court, *sua sponte*, granted summary judgment. In fact, it was only *partial summary judgment;* since it declared illegal not the *entire* RECOMMENDATION No. 11 (which Appellees were seeking in their complaint) but only paragraphs 2, 3 and 4 thereof (R. 143-144). Technically, the District Court should have applied Rule 56(d) in this case.

In any event it is Appellees' contention that the Petitioners are premature in trying to anticipate the question of constitutional law in advance of trial of the remaining issues raised by the complaint. It is certainly conceivable (and Appellees contend it is probable) that trial of the issues raised by the complaint will show that the entire RECOMMENDATION No. 11 is illegal on the grounds (a) that conduct of the Convention violated AFM laws; (b) that, as held by the Court below, part of RECOMMENDATION No. 11 violated Section 101(a)(3) of the Act of 1959; and (c) that the officers who conducted the Convention, especially the Presiding Officer, violated their fiduciary responsibilities under Section 501 of the Act of 1959 in pushing RECOMMENDATION No. 11 through the Convention. Appellees claim that with respect to contentions (a) and (c) the District Court had pendent jurisdiction. *Hurn* v. *Oursler*, 289 U. S. 338.

This Court will not act upon a constitutional question, even when properly presented by the record, if there is also present some other ground upon which the case may be disposed of (*Ashwender* v. *Tennessee Valley Authority*, 297 U. S. 288, 346-348).

This Court will ascertain whether a construction of the statute is fairly possible by which the constitutional question may be avoided (*Ashwender* v. *Tennessee Valley Authority*, *supra*).

This Court has at times refused to entertain jurisdiction in an allegedly constitutional case, even though that jurisdiction is invoked as of right, where the record was inadequate for decision of the constitutional issues. *Rescue Army* v. *Municipal Court*, 331 U. S. 549; *International Brotherhood* v. *Denver Mill Producers*, 334 U. S. 809.

Much of the argumentation to be found in the dissenting opinion of Judge Marshall and in the Petitioners' Brief, as well as in the Briefs submitted by the AFL-CIO and the Department of Justice, *assume the existence of facts which are not to be found in the Record*. The Appendix of the AFL-CIO Brief contains, in summary, tabular form, a lengthy series of constructions and applications of 131 AFL-CIO union constitutions, whose relevant and applicable language is not even quoted, and evidence of whose practical construction is nowhere to be found in the Record. "Appendix A" is untested by direct examination or by cross examination of qualified witnesses. The qualifications of those who prepared Appendix A are not stated. Nor is their manner of procedure explained in adequate detail.

No constitutional right of assembly or free association is prejudiced or even threatened by the majority opinion below. Petitioners set limits to the reach of their argument as follows: "The constitutionally protected right to association necessarily encompasses the right to determine

the rules governing its structure and procedure; that right in turn may NOT be infringed without some overriding public purpose * * *."

The short answer is that there *were* "overriding public purposes"; namely, to *democratize* and to make *more representative* the process by which Union dues or initiation fees are established or increased. This public purpose is eminently served by the statute as construed below. The members were at all times prior to its enactment totally in the dark as to RECOMMENDATION No. 11. In all of the circumstances of the Convention, the delegates themselves were prevented from intelligently representing their constituents by their own lack of information, study and deliberation and by the actual cloture of discussion effected by the lateness of the hour and by the limitation on debate.

If, as Petitioners consider it obvious, "*self-organization* means that those who join in a common cause themselves prescribe the rules by which their organization exists and functions" (Brief, p. 53); and if the National Labor Relations Act guarantees to employees the right of self-organization; Petitioners' argument makes all federal regulation of Union rules unconstitutional. Petitioners speak hyperbolically of Government's "unfettered power to fix the rules by which organizations may make decisions" (Brief, p. 53). Of course there is not, and there is no claim that there should be, any "unfettered power" in the government or in anyone else.

It is gross error to argue that "the statute (as construed by the majority below) outlaws long recognized Union procedures for self-government admittedly without advancing membership participation—the provisions' sole avowed purpose." Petitioners themselves conducted the Convention so as to prevent membership participation in processing RECOMMENDATION No. 11.

In *Thomas* v. *Collins*, 320 U. S. 516 (cited by Petitioners, Brief p. 53) a statute mandating registration before solicitation of union membership was found to violate the right of peaceable assembly. That case has no application here. The same is true of the others cited on pages 52-56 of Petitioners' Brief.

In any event, the case should be remanded to the District Court for trial of *all* of the issues raised by the Complaint. Only a trial (where the *verbatim* minutes of the Convention will have to be produced) will place in the Record the nature and scope of Petitioners' efforts to limit delegate and membership participation respecting RECOMMENDATION No. 11.

Conclusion.

By reason of the foregoing, the judgment of the Court of Appeals should be affirmed; or, in the alternative, the case should be remanded for trial to the District Court in order to provide a proper record for decision of the alleged Constitutional and Federal questions.

Respectfully submitted,

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